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IRISH EQUITY REPORTS,

OF

CASES

ARGUED AND DETERMINED IN THE

HIGH COURT OF CHANCERY,

THE

ROLLS COURT,

AND THE

EQUITY EXCHEQUER,

DURING THE YEARS 1848 AND 1849.

Chancery :

By JOHN F. WALLER, Esq., and JOHN E. WALSH, Esq.

Rolls :

By EDWARD S. TREVOR, Esq.

Equity Exchequer :

By WM. ST. LEGER BABINGTON, Esq., LL.D., and LEWIS MORGAN, Esq.

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During the period of these Reports.

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Master of the Rolls.—The Right Hon. THOS. BERRY CUSACK SMITH.

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GENERAL ORDERS

In Chancery.

Dated the 9th day of October 1848.

THE Right Honorable MAZIERE BRADY, Lord High Chancellor of Ireland, with the advice and assistance of the Right Honorable THOMAS BERRY CUSACK SMITH, Master of the Rolls, doth hereby, in pursuance of an Act of Parliament passed in the eleventh and twelfth years of the reign of Her present Majesty, intituled "An Act for extending to Ireland an Act passed in the last Session of Parliament, intituled 'An Act for better securing Trust Funds, and for the Relief of Trustees,'" and in pursuance and execution of all other powers enabling him in that behalf, order and direct, in manner following, that is to say :—

I.

Any trustee desiring to pay money, or transfer stock or securities into the name of the Accountant-General of the Court of Chancery, under the said Act, is to file an affidavit, entitled in the matter of the Act and of the trust, and setting forth—

1. His own name and address.
2. The place where he is to be served with any petition, or any notice of any proceeding or order of the Court relating to the trust fund.
3. The amount of stock, securities, or money which he proposes to deposit, or to transfer, or to pay into Court, to the credit of the trust.

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4. A short description of the trust, and of the instrument creating it.
5. The names of the parties interested in or entitled to the fund, to the best of the knowledge and belief of the trustee.
6. The submission of the trustee to answer all such inquiries relating to the application of the stocks, securities, or money transferred, deposited, or paid in, under the Act, as the Court may think proper to make or direct.

II.

The party filing such affidavit, on production of an attested copy thereof, is to be at liberty to enter a side-bar rule to lodge or invest the money, stock, or security specified in such affidavit, in the Bank of Ireland, with the privity of the Accountant-General, to the account of the particular trust.

III.

The Accountant-General, on production of an office copy of the affidavit and rule, is to give the necessary directions for transfer, deposit, or payment, and to place the stock, securities, or money, to the account of the particular trust; and such transfer, deposit, or payment is to be certified in the usual manner.

IV.

The trustee having made the payment, transfer, or deposit, is forthwith to give notice thereof to the several persons named in his affidavit, as interested in or entitled to the fund.

V.

Such persons, or any of them, or the trustee, may apply by petition, as occasion may require, respecting the investment, payment out, or distribution of the fund, or of the dividends or interest thereof.

VI.

The trustee is to be served with notice of any application made to the Court respecting the fund, or the dividends or interest thereof, by any party interested therein, or entitled thereto.

VII.

The parties interested in, or entitled to the fund, are to be served

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with notice of any application made to the Court by the trustee, respecting the fund in Court, or the interest or dividends thereof.

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VIII.

No petition is to set down to be heard, until the petitioner has first named a place where he may be served with any petition, or notice of any proceeding or order of the Court, relating to the trust fund.

IX.

Petitions presented, and affidavits filed, and rules entered, under the said Act, are to be entitled in the matter of the said Act (11 & 12 Vic. c. 68), and in the matter of the particular trust.

MAZIERE BRADY, C.

T. B. C. SMITH, M. R.

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January 3, 1849.

THE Right Honorable MAZIERE BRADY, Lord High Chancellor of Ireland, by and with the advice and assistance of the Right Honorable THOMAS BERRY CUSACK SMITH, Master of the Rolls, doth hereby order and direct, in manner following:—

I.

That no recognizance hereafter to be entered into by or for any tenant, receiver, sequestrator, guardian or other person, who, according to the general practice or orders of the Court, or to any special order made in any cause or matter, may be bound to enter into a recognizance, shall be deemed to be completed, within the meaning of such practice or orders, or special order, unless and until, in addition to the due enrolment thereof, the same shall be duly registered in the office of the registrar of judgments, in pursuance of and according to the provisions of the Act of the seventh and eighth years of the reign of her Majesty, intituled, “An Act for the protection of purchasers against judgments, Crown debts, *lis pendens*, and commissions of bankruptcy; and for providing an office for the registry of all judgments in Ireland; and for amending the laws in Ireland respecting bankrupts, and the limitation of actions;” and of an Act passed in the eleventh and twelfth years of the reign of her Majesty, intituled “An Act to facilitate the transfer of landed property in Ireland.” But the non-compliance with this Order shall not affect the validity of such recognizance at Law or in Equity, otherwise than as the said Acts, or either of them, may in such case affect the same, as against purchasers, mortgagees, or creditors.

II.

That the Masters shall not perfect any lease under a letting made to a tenant until, in addition to the certificate of the enrolment of his recognizance, a certificate of the said registrar of judgments, of the lodgment and entry of the memorandum or minute of such

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v.

recognizance, required by the said first-mentioned Act to be left with him, endorsed on a duplicate of such memorandum or minute, in pursuance of the said Act of the eleventh and twelfth years of the reign of her Majesty, shall be produced.

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III.

That the production of a like certificate of the registrar of judgments shall be requisite, with the certificate of the enrolment of the recognizance, to entitle a receiver, sequestrator, or guardian to enter the General Order that the tenants do pay their rents and arrears to him.

IV.

That all receivers, sequestrators and guardians already appointed shall proceed without delay, and before the first day of February next ensuing, to have the several recognizances heretofore entered into by them, or on their behalf, duly registered, pursuant to the said Acts, in the office of the said registrar of judgments, and do produce the like certificate of the said registrar as aforesaid in respect thereto to the Master, on the passing of their next accounts respectively, who may therein allow the costs of such registry; and the Master shall have power to disallow his poundage on such account to any receiver, sequestrator, or guardian not producing such certificate, dated on or before the said first day of February, unless some satisfactory reason shall be given to him for the delay; and the Masters shall not pass any such account without production of the certificate; and in their certificate of the allowance of the account shall state that the same was produced, and the date thereof.

V.

That to the next statement of facts to be laid before the Master by any receiver, sequestrator, or guardian, or to his next account, whichever shall be first lodged after the date hereof, there shall be annexed, by way of schedule, a specification of the several tenants by whom recognizances have been entered into, and the amount thereof respectively; and the Master shall examine into the same, and shall be at liberty in all cases, when he shall think fit, to direct the receiver, sequestrator, or guardian, or his solicitor, to effect, within a time to be fixed by the Master, the due registration under

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the said Acts, of all or any of the said recognizances, which it may be proper to have so registered, and to allow the costs thereof in the account of such receiver, sequestrator, or guardian, and to suspend the passing of any account until such direction shall have been complied with.

VI.

That any party interested in any cause or matter, or the receiver, sequestrator, or guardian appointed therein, may register under the said Acts the recognizance of any deceased or discharged receiver, sequestrator, or guardian, or of any party, which shall not have been vacated; and the Master may allow in his next account to any such receiver, sequestrator, or guardian, the costs of such registration, where he shall think it was proper that the same should have been effected; and the Master may also allow and direct to be paid to the general solicitor for minors, out of any funds properly applicable thereto, the costs of any such registration made by him, in cases where it may be necessary that such registration should be so made.

VII.

That the fee of 16s. 8d. shall be allowed to the solicitors of the Court for attending to register any judgment, decree, order, Crown bond, *lis pendens*, or recognizance under the said Acts, and for all duties relating thereto, including the preparation and signing of the memorandum and minute to be lodged with the registrar, and a duplicate thereof; but the Masters, in allowing any costs, under the fifth foregoing Order, for the registration of the recognizances of tenants, may allow a lesser sum for each, in their discretion, having regard to the numbers registered by the same solicitor in the same cause or matter.

VIII.

That where a separate report shall be made by a Master under a decree containing a direction to appoint a receiver, as provided by the 153rd of the General Orders of the 27th day of March 1843, any objection to such separate report shall be taken by notice, and not by way of exception; and no cause shall be set down to be heard on such separate report, or on any objection thereto.

MAZIERE BRADY, C.

T. B. C. SMITH, M. R.

GENERAL ORDERS

FOR REGULATING THE PROCEEDINGS

UNDER AN ACT ENTITLED

“AN ACT TO FACILITATE THE SALE OF INCUMBERED
ESTATES IN IRELAND.”

Dated the 18th day of January 1849.

THE Right Honorable MAZIERE BRADY, Lord High Chancellor of Ireland, by and with the advice and assistance of the Right Honorable THOMAS BERRY CUSACK SMITH, Master of the Rolls, doth hereby, in pursuance of an Act of Parliament entitled “An Act to facilitate the Sale of Incumbered Estates in Ireland,” and in pursuance of all other powers in him vested, order and direct in manner following:—

I.

Every petition to be presented under the said Act, for the confirming and carrying into effect any contract for sale, or for the sale of any land or lease, shall be verified by the affidavit of the petitioner or petitioners, or by that of some other person or persons, stating special reasons why the affidavit of the petitioner or petitioners cannot be obtained in support of said petition.

II.

That the deponent or deponents in every such affidavit shall depose to the truth of the several matters stated in the petition; and in addition thereto shall state that there is not, to his, her or

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their knowledge or belief, any person having any estate or interest in the lands or lease mentioned in the said petition, or any incumbrance or charge thereon, or whose consent is necessary to a sale thereof, other than the persons severally named as such in the petition.

III.

That the fees to be paid upon proceedings under the said Act, and all costs to be allowed thereon, shall be the same as may be now lawfully received by or allowed to the officers and solicitors of the Court on similar proceedings in any cause or matter pending in the Court; and all rules and orders of the Court for the taxation of costs shall apply to the fees and costs of such proceedings.

IV.

That the Masters in ordinary of the Court, and the Registrars, shall cause to be duly and regularly entered in proper books, to be kept in their respective offices, according to forms to be submitted to and approved of by the Lord Chancellor, the several particulars required to be stated in the return directed by the said Act to be laid before Parliament, so far as the documents and proceedings in their said respective offices will enable them so to do; and all such entries shall be made weekly at the least, so as to show at the end of each week the total amounts and quantities, to that time, of the several matters required to be set forth in such return.

V.

Every petition shall contain an undertaking by the petitioner to submit to such order as the Court may think proper to make, in the event of its appearing, on any inquiry to be directed under the petition, that such petitioner was not a person authorised by the statute to present such petition.

VI.

That the petition by the owner of land, under the 2nd section of the said Act, or by the owner of a lease, under the 4th section of the said Act, who shall have contracted, subject to the approbation of the Court, for the sale thereof, shall be entitled, and shall contain the statements, as hereinafter set forth, with such variations as the nature and circumstances of each case may require.

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ix.

In the Matter of the Act to facilitate the Sale of Incumbered Estates in Ireland,
Es parte
[State the Name of the Petitioner.]

To THE RIGHT HONORABLE THE
LORD CHANCELLOR.

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The humble Petition of

The petition shall state—

1st.—The date of the contract for the sale of the lands or lease, the parties thereto, and a concise abstract of the contents thereof.

2ndly.—In case the petition is by the owner of a lease under the 4th section of the Act, the petition shall state the date of and the parties to the lease, and the short particulars thereof.

3rdly.—The petition shall state the estate or interest of the petitioner in the lands [or lease] so contracted to be sold, and the uses or limitations, and the trusts, if any, to which the said lands [or lease, as the case may be] stand limited or settled; and shall also state the name of every person who, to the knowledge or belief of the petitioner, has any estate or interest in the lands or lease in the said petition mentioned; and the dates of and parties to the several instruments referred to in the petition; and the party by whom the petition is prepared shall take special care that the abstract of the material parts of said instruments, stating the said uses or limitations and trusts, shall be made with as much conciseness and brevity as is consistent with a clear statement of the same.

Section 7.

4thly.—In case the purchase money of the lands or lease contracted to be sold is less than the amount of the sum due on foot of the incumbrances and charges in the second schedule to the petition mentioned, the petition shall further state the lands, if any, not contracted to be sold, which are subject to, or affected by, such incumbrances or charges, and the estate or interest of the petitioner therein; and the name or names of the other owner or owners thereof, if any; and the gross rental thereof; and the several charges and incumbrances, if any, affecting said last-mentioned lands, and which shall not be specified in the second schedule to the said petition; and the net annual rental thereof.

5thly.—The petition shall further state, that in the first schedule thereunto annexed, is set forth a true and accurate rental of the lands [or leasehold interest] contracted or proposed to be sold; and

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such schedule shall be in the form hereinafter set forth, and shall state the names of each sub-denomination, if any, the names of the tenants, the dates of, and parties to, the leases or other instruments under which the said tenants respectively hold, the tenures, the number of acres held by each tenant, the annual rents, the gale-days, and the arrear due by each tenant to the last gale-day.

6thly.—The petition shall further state, that in the second schedule thereto annexed, is set forth a true and correct list of all the incumbrances and other charges affecting the lands [or lease] contracted or proposed to be sold; and the names of the several persons entitled thereto, or interested therein; together with the sums due on each incumbrance or charge, distinguishing principal from interest; and such schedule shall be in the form hereinafter set forth, and shall distinguish such incumbrances or other charges which affect a derivative estate or interest, or less than the whole estate or interest in the lands or lease contracted to be sold, from such incumbrances or charges as affect the whole estate or interest in the lands or lease contracted or proposed to be sold; and shall also distinguish those incumbrances or charges which affect all the lands from such as may affect only a portion of thereof; and the petition shall state that there is not, to the knowledge or belief of the petitioner, any incumbrance or charge affecting said lands (or lease, as the case may be), save the incumbrances and charges in the said schedule set forth.

7thly.—The petition shall state the Crown-rents or quit-rents (if any) subject to which such lands [or lease, as the case may be], shall be contracted or proposed be sold.

8thly.—The petition shall further state, that no incumbrancer is in possession of any part of the lands, and that no receiver has been appointed over the said lands [or lease, as the case may be], or any part thereof; or if any incumbrancer is in possession, or has obtained an order for a receiver, add—save and except the party named, and that the consent in writing to the petition has been obtained, signed by such incumbrancer—and the petition should set forth the short particulars of the consent and the date thereof.

9thly.—In case the lands are subject to any mortgage or mortgages, the petition shall state that they do not, nor do any of them

contain any power of sale ; or in case a power of sale is contained in any such mortgage, that the mortgagee has consented to the application ; or if there has been a refusal or neglect to use diligence towards the exercise of such power of sale, the petition should state such refusal or neglect, as specified in the 67th section of the Act.

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10thly.—The petition shall further state, that no suit for foreclosure, redemption, or sale of the said lands [or lease, as the case may be], or any part thereof, commenced before the 1st of July 1848, is pending ; or if any suit is pending, state the parties thereto, and when the bill was filed ; and if such consent, as is stated in the 67th section of the Act, has been obtained, state same.

11thly.—The prayer of the petition should be carefully framed in accordance with the 10th section of the Act, according to the circumstances of the particular case ; and it should further pray, that the contract for the sale should be carried into effect, in case the petitioner has previously to the petition entered into a contract in pursuance of the Act, or if not, it should pray for a sale of the lands [or lease, as the case may be] under the provisions of the Act ; and the petitioner should also pray for general relief.

The form of the petition, where the petitioner has not previously contracted for the sale of the land or lease, shall be the same [omitting the statements numbered 1 and 4], with such variations only as may be necessary in consequence of no previous contract having been entered into.

FIRST SCHEDULE TO THE PETITION.

Containing Rental of the Lands of _____, in the County of _____ (contracted to be sold)—or where the Owner has not contracted previous to the petition (which the petitioner applies to the Court for the sale of), under the Provisions of the Act.

Sub-denomination, if any.	Tenants' Names.	Date of and Parties to the Leases, or other Instruments, if any, under which the Tenants respectively hold.	Tenure.	No. of Acres.	Annual Rent.	Gale Days.	The Arrear due by each Tenant to the last Gale Day.	OBSERVATIONS.

If any part of the Lands is in the actual possession or occupation of the Petitioner, state the number of Acres of which the Petitioner is so in the possession or occupation.

SECOND SCHEDULE TO WHICH THE FOREGOING PETITION REFERS.

Containing a List of all the incumbrances and charges affecting the lands [or leasehold interest, as the cause may be] contracted to be sold ; or [sought to be sold, under the order of the Court, as the case may be].

1.	2.	3.	4.	5.	6.	7.	8.	9.	10.
Nature of Incumbrance ; describing the particular nature of the same, according to the definition thereof in the 1st section of the Act ; i. e. whether it is a Mortgage, or Money secured by a Trust, or by Judgment, or by Decree, &c.	Charge, if any, not falling within the definition of an Incumbrance under the Act, <i>e. g.</i> a Jointure, or Rent-Charge, or other Annual Charge not re-purchasable on payment of a gross sum of money.	Date and Nature of the Instrument by which the Incumbrance or Charge was created, <i>e. g.</i> whether by Deed, Will, &c., and the date of the Judgment, Decree, Order, &c.	Parties to the said Instrument, Judgment, Decree, &c.	Parties in whom Incumbrance or Charge now vested.	Whether the Incumbrance, Decree, Judgment, &c., affect the whole or a part, and if so, what part of the Lands contracted to be Sold, or sought to be Sold, under the Court.	Whether the Incumbrance, Decree, Judgment, &c., affect the whole Estate and Interest in the Lands for Leasehold Interest contracted or sought to be Sold under the Order of the Court, or only a derivative Estate or Interest, or less than the whole Estate or Interest in said Lands [or Leasehold Interest], and if so, the nature and extent of such particular or derivative Estate or Interest.	Principal sum due on Incumbrances falling under first column.	Interest due on Incumbrances falling under the first column, stating the rate of Interest payable on each respectively, and the day up to which the Interest in each case is calculated.	Arrear, if any, due on the Charges specified in the second column, and up to what day such Arrear in each case is calculated.

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That the petition by the first incumbrancer on any land or lease, under the 2nd or 4th sections of the said Act, shall be entitled and contain the statements as hereinafter set forth, with such variations as the nature and circumstances of each case may require.

In the Matter of the Act to facilitate the Sale of Incumbered Estates in Ireland, <i>Es parte</i> [State the name of the petitioner.]	}	TO THE RIGHT HONORABLE THE LORD CHANCELLOR. The humble Petition of
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The petition shall state—

1st.—The incumbrance vested in the petitioner, and how created, and if same was created by an instrument in writing, the date of and parties thereto; and the petition shall further state the material parts of such instrument, and no other parts thereof; such statement to be made, and the instrument abstracted, with as much conciseness and brevity as is consistent with clearness. If the incumbrance be a judgment, decree, or order of the Court, the petition shall state the date and parties thereto. If the petitioner was no party to such instrument, judgment, decree, or order, &c., the petition shall state concisely the instruments by which the right to such incumbrance is vested in the petitioner; the party preparing the petition taking special care that the title to the incumbrance shall be set forth in as concise a manner as is consistent with a clear deduction of such title. If the incumbrance is a judgment, and shall have been revived, the petition shall state the revival, and the parties to such judgment of revival.

2ndly.—If the petition is under the 4th section of the Act, it shall state the date of, the parties to, and the short particulars of the lease sought by the petition to be sold under the order of the Court.

Section 7.

3rdly.—The petition shall state the uses or limitations, and the trusts, if any, to which the land or lease stands limited or settled, so far as the petitioner is acquainted with same, and in whom the estate or interest in the land or lease is vested; and the name of every person who, to the knowledge or belief of the petitioner, has any estate or interest in the lands or lease in the said petition mentioned; but the petitioner is not to be allowed any costs or expenses for searching the registry.

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4thly.—The petition should further state, that in the schedule thereto annexed, the petitioner has set forth, to the best of his knowledge and belief, a true and correct list of all the incumbrances and other charges affecting the lands [or lease, as the case may be] proposed to be sold; and the names of the several persons entitled thereto, or interested therein; together with the sums due on each incumbrance or charge; and such schedule shall be in the form of the second schedule annexed to the petition by the owner of land; and which form the said incumbrancer shall fill up to the best of his knowledge and belief; and the petition shall state that there is not, to the knowledge or belief of the petitioner, any incumbrance or charge affecting said lands [or lease, as the case may be], save the incumbrances and charges in said schedule set forth. The petitioner, however, is not to be allowed any costs for searches. This and the preceding provision, however, as to costs, are not to apply to any searches which may be directed by the Master to whom the petition may be referred.

5thly.—The petition shall state the Crown-rents and quit-rents, if any, subject to which such land [or lease, as the case may be] shall be sought to be sold.

The petition shall further state the matters to be stated, eighthly, ninthly, and tenthly, in the petition, by the owner of land; and the prayer shall be framed under the 10th section of the Act, according to the circumstances of the case; and the petition shall further pray, that the lands [or lease, as the case may be] may be sold under the provisions of the Act; and general relief.

A petition by an incumbrancer under the 2nd or 4th sections of the Act [not being the first incumbrancer], and being in possession of the title deeds and writings relating to the land [or lease, as the case may be], shall be similar to a petition by a first incumbrancer, stating, in a schedule to his petition, a list of the deeds and writings in his possession.

VII.

That every petition as aforesaid shall be headed as follows, according to the circumstances of each case:—

1st. Petition by the owner of land who has contracted for the

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sale thereof under the 2nd section of the Act ; or 2ndly, petition by the owner of land, under the 2nd section of the Act, who has not contracted for the sale thereof : or 3rdly, petition by the first incumbrancer on land, under the 2nd section of the Act for the sale thereof ; or 4thly, petition by an incumbrancer on land, under the 2nd section of the Act, having possession of the title deeds and writings relating thereto, for the sale of such land ; or 5thly, petition by the owner of a lease who has contracted for the sale thereof under the 4th section of the Act ; or 6thly, petition by the owner of a lease, under the 4th section of the Act, who has not contracted for the sale thereof ; or 7thly, petition by the first incumbrancer on a lease, under the 4th section of the Act, for the sale thereof ; or 8thly, petition by an incumbrancer on a lease, under the 4th section of the Act, having possession of the title deeds and writings relating thereto, for the sale of such lease.

VIII.

It is further ordered (in order to diminish the costs and expenses of proceedings in the Master's office) that where a petition shall be presented by the owner of land, or of a lease, under the 2nd or 4th sections of the said Act [whether the said owner shall or shall not have previously contracted for the sale thereof], and where an order of reference shall be made upon said petition, referring it to the Master [amongst other things] to take an account of the incumbrances and charges affecting the said land or lease, that the Master shall, without any charge or discharge being filed, report the several sums stated to be due for principal and interest in the second schedule to the said petition ; and also the arrear (if any) stated to be due upon the charges therein also mentioned, to the several parties respectively in whom the said incumbrances and charges shall be stated to be vested, together with any additional interest or arrear which may accrue before the signing of the report, unless so far as any error shall be established in said schedule, under the circumstances hereinafter stated, that is to say—

1st.—Any person in whom it is stated by said schedule that an incumbrance or charge is vested, shall be at liberty to file a charge

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for the purpose of correcting any error in said schedule, either in respect of the amount of principal or interest stated to be due on such incumbrance, or in respect of the arrear stated to be due on foot of such charge; or in case the said incumbrance or charge is not vested absolutely in the person stated in such schedule, or if any other person or persons is or are entitled to any estate, share, or interest therein, or if the said schedule shall be in any other material particular inaccurate in relation to said incumbrance or charge, a charge may be filed to correct such error; and if it shall appear to the Master that it was necessary and proper to file such charge for the purpose of correcting an error in said schedule, he shall in his report correct such error accordingly, and shall be at liberty to allow a sum not exceeding £5 to the said person for the costs of filing such charge; but if the said schedule was correct, and the charge unnecessarily filed, such person on whose behalf such charge shall be filed shall pay to the petitioner such sum for costs, not exceeding £5, as the Master shall direct; which sum shall be deducted from his demand, or paid to the petitioner, as the Master shall direct: provided always, that in case the said charge shall be contested, the Master shall be at liberty to allow such additional sum beyond £5, in the cases aforesaid, as he may deem reasonable.

2ndly.—Any person in whom it is stated by the said schedule that an incumbrance or charge is vested, or any person whose name or whose charge or incumbrance is not stated in such schedule, who shall file a charge on foot of any incumbrance or charge, save in the case hereinafter mentioned, provided such charge so filed shall be allowed by the Master; and any other person having any estate or interest in such land or lease, with the permission of the Master, shall be at liberty [in case such person disputes the right of any party whose name is specified in the schedule, or the sum stated to be due to such party] to file in the Master's office a traversing note, to the effect hereinafter stated—and thereupon a copy of such traversing note shall be served by the party who shall have filed same, upon the party in whom it is stated in such schedule that the said incumbrance or charge is vested; and in case the party upon

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whom such traversing note shall be served shall not within one month after such service, or such further time as the Master shall allow, file a charge on foot of his said claim, the Master shall disallow same, and shall allow such sum for costs, not exceeding £5, to the person filing such traversing note, as the said Master shall think fit, such sum so allowed for costs to be added to his demand; and if the person served with such traversing note shall file a charge on foot of his claim, the party filing such traversing note (but no other person without the leave of the Master) shall be at liberty to file a discharge thereto; and such proceedings shall or may be taken on foot of such charge and discharge as are in such cases usual; and if the charge so filed shall be disallowed by the Master, the person filing such charge shall be liable to pay to the person by whom the said traversing note shall have been filed his costs, properly and necessarily incurred in disputing such claim; which costs the Taxing Master shall tax and certify without any order of the Court, upon a certificate signed by the Master of the disallowance of such charge; and if the Master shall allow the charge so filed, the person by whom such traversing note shall have been filed shall pay to the person whose charge shall be so allowed his costs, properly and necessarily incurred in establishing such claim; and which costs the Taxing Master shall tax and certify without any order of the Court, upon a certificate, signed by the Master, of the allowance of such charge; provided always, that the Master shall be at liberty to name any sum to be paid by either of the said parties as and for the costs, without taxation: And it is further ordered, that if any party filing a charge under the said order of reference shall claim any incumbrance or charge specified in said schedule, or any right, share, or interest therein, and shall dispute the right of the person in whom it is stated in said schedule that the said incumbrance or charge is vested, either in the whole or in part, it shall not be necessary in such case to file any traversing note—but the person in whom it is stated by the schedule that such incumbrance or charge is vested, shall receive notice of such charge, and he shall thereupon be at liberty to file a discharge to such charge—and the Master shall decide the rights of the said claimants, and make up his report thereon accordingly, and

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shall make such order as to the payment of costs by the one claimant to the other as he shall think fit; and the Taxing Master shall tax said costs without any order of the Court for that purpose, upon the certificate of the said Master; provided always, that it shall and may be lawful for the Master to name any sum to be paid by either of said parties as and for the costs, without taxation; provided also, that it shall be lawful for the said Master, if he shall so think fit, and if it shall appear that the schedule to the petition was erroneous in stating the name of the person in whom the incumbrance or charge was vested, to direct that a sum not exceeding £5 shall be paid by the owner of the land or lease to whichever of the said claimants the Master shall direct; such costs to be added to the demand against the said owner, or otherwise paid, as the Master shall direct—and credit shall be given for such sum out of costs awarded as between the claimants, if the Master shall so direct: And it is further ordered, that the said traversing note shall be to the following effect, having regard to the circumstances of each case, that is to say:—

In the Matter of the Act to facilitate the Sale of Incumbered Estates in Ireland,
Ex parte
[Name the Petitioner in the Matter.]

A. B. a person whose name is included as an incumbrancer [or having a charge] on the land [or lease] in the schedule to the petition mentioned; or

A. B. a person who has filed a charge under the order of reference in this matter, and whose charge has been allowed; or A. B. a person having an interest in said land [or lease], with the permission of the Master [as the case may be], disputes the claim of C. D. in the second schedule to the petition mentioned, either wholly or in part [as the case may be], and requires the said C. D. to file a charge and establish same.

IX.

It is further ordered, that if any person who shall be entitled to any charge, not being an Incumbrancer, within the meaning of the said Act [including any such apportioned charge as in said Act mentioned], shall be willing, under the provisions of the 22nd section of the said Act, to accept a gross sum in satisfaction of such charge, and shall file a charge under said order of reference for such

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purpose, and if the Master shall include in his report such charge as an incumbrance under the provisions in such section, it shall be lawful for the Master to allow such sum, not exceeding £5, for the costs of such charge, as the Master shall think fit: provided always, that in case said charge shall be contested, the Master shall be at liberty to allow such additional sum beyond £5 as he may deem reasonable.

X.

And it is further ordered, that if any incumbrancer, or person having a charge to whom an arrear on foot of such charge is due, shall claim priority over any other charge or incumbrance, prior in point of date, under the provisions of the Act for the Registry of Deeds, or the Act for the Registration of Judgments, or upon any other ground, such person shall be at liberty to file a charge for the purpose of claiming such priority, if such priority shall not appear in the second schedule to such petition; and shall in such case be entitled to such costs of proving such claim, not exceeding £5, as the Master shall direct: provided always, that in case said charge shall be contested, the Master shall be at liberty to allow such additional sum beyond the £5 as he may deem reasonable; and provided also, that the costs of any discharge which may be filed to such charge by any other incumbrancer shall not be borne by the owner of the land or lease.

XI.

And it is further ordered, that where the owner of land, or of a lease, shall present a petition under said Act, and such owner shall be only tenant for life, or have some other limited interest therein, and where from the disability of the party entitled in remainder, or for any other cause, the Master shall so think right, it shall be lawful for the Master to direct a charge to be filed by any person, in whom it is stated by the second schedule to the petition, such charge or incumbrance is vested; and to require such proof as to the said incumbrance or charge as he may think right; and to allow such costs for such charge, and for proving same, as the Master shall think reasonable, in case same shall be proved to his satisfaction.

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XII.

And whereas, if the petition by the owner of land, or of a lease, under the 2nd or 4th sections of the said Act, be properly prepared as hereinbefore directed, the expense of filing a charge thereunder, for the purpose of again stating the uses and limitations, or trusts, if any, to which said land or lease is subject, or for the purpose of any of the other inquiries directed by the order of reference, will be unnecessary; it is further ordered that no charge shall be filed for any such purposes under said order of reference unless the Master shall otherwise direct; and if the Master shall direct a charge to be filed, it shall be confined to such matters as the Master shall direct; and it is further ordered that the Master shall be at liberty, if he shall consider that the petition sufficiently sets forth and puts in issue the documents and other matters necessary to be proved under the order of reference, to proceed to make the inquiries directed by said order upon a summons, without any charge being filed; and if the Master shall direct such charge to be filed, no costs thereof shall be allowed to the solicitor as against the petitioner, unless the Master shall otherwise direct.

XIII.

It is further ordered, that if proceedings shall be taken before the Master upon such petition without a charge being filed, the petition shall be considered as a charge, for the purpose of entitling any person to file a discharge to such petition, who would have been entitled, according to the practice in the Master's office, to file such discharge if a charge had been filed; and where said petition shall be proceeded on as a charge, all General Orders of the Court shall be applicable to the proceedings on such petition as would be applicable to proceedings on a charge.

XIV.

It is further ordered, that where a petition shall be presented by the owner of land, or of a lease, under the 2nd or 4th sections of the said Act (whether the said owner shall or shall not have previously contracted for the sale thereof), and an order of reference shall be made thereon, the advertisement which the Master shall cause to be

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published under the 14th section of the said Act (in addition to the matters directed by the said section) shall, instead of requiring all persons having incumbrances to come in and prove their demands, require all incumbrancers and persons having charges to proceed in the manner directed by the 8th General Order hereinbefore set forth ; and in case the Master shall cause any notice to be served, under the 16th section of the said Act, upon any person in whom it shall be stated, in the second schedule to said petition, that an incumbrance or charge is vested, such person shall not be entitled to any costs of appearing before the Master in pursuance of such notice, other than such costs as are provided for by these General Orders, unless the Court shall otherwise direct.

XV.

It is further ordered, that in every report to be made by the Master under any order of reference under the said Act, the Master shall state, in a schedule to his said report, the number of meetings which have taken place under the said order of reference, and the dates of such meetings.

MAZIERE BRADY, C.

T. B. C. SMITH, M. R.

CASES

IN THE

COURTS OF CHANCERY, ROLLS,

AND

Equity Exchequer.

BOROUGH v. WILLIAMSON.

(*Chancery.*)

BEFORE THE LORDS COMMISSIONERS.*

1848.

January 25.
May 31.

THIS was a mortgagee's suit for foreclosure and sale of certain freehold estates, one-third of which belonged to John Browne Williamson, one of the mortgagors, the remainder to his brothers David and George, the other mortgagors.

Under the decree to account the Master found, that in or as of Hilary Term 1842, the defendant Emma B. Williamson obtained a judgment in her Majesty's Court of Common Pleas against the defendant John B. Williamson for the penal sum of £1000 debt

Since statute 3 & 4 Vic. c. 105, judgments of the same Term, entered after its passing, have priority *inter se* as charges on lands, according to the true dates of their entries.

Quere as to the priority

inter se of such judgments entered before the passing of that Act.

A testator devised to his sons to be disposed of as after mentioned all his estate in W., and to the survivor, &c., of his sons, and all his estate in P., subject to his proportion of the head-rent, and also subject to and in trust to pay out of the rents thereof an annuity to his daughter, and the remainder of the rents until she should be paid a sum of £500. Then followed a bequest of an annuity of £40 charged on parts of W., and there was a residuary devise to the three sons. *Held*, that the bequests to his daughter were charged only on P. and not on any of W.

* Heard before RICHARDS, B., JACKSON, J., and BROOKE, M. C.

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besides costs; and that there was due to the said Emma B. Williamson upon foot of the said judgment the principal sum of £500 and certain arrears of interest and costs, amounting to £667. 11s. He also found that the defendant John Buckley, in or as of Hilary Term 1842, obtained separate judgments in her Majesty's Court of Exchequer against the defendant John B. Williamson and the two other mortgagors for the sum of £700 debt besides costs, to secure £350 and interest, and that the said last mentioned judgments were obtained on the joint and several bond of the conuzors, dated the 9th of February 1842, and that there was due for principal, interest and costs to the said John Buckley £478. 14s. 6d. The report then contained the following finding: "I find that the judgment so obtained by the said Emma Browne Williamson as aforesaid, and the judgments so obtained by the said John Buckley having been entered up as of one and the same Term, as hereinbefore mentioned, although the said judgment so obtained by the said Emma B. Williamson was, in fact, entered before the said Buckley's judgment, are all of equal priority, and therefore that the respective sums so due upon foot of said four last mentioned judgments are in equal priority as aforesaid the next charge" (after the plaintiff's mortgage) "affecting the estate and interest of the said defendants John, David and George B. Williamson in the said lands and premises, and that neither of the sums now due or to accrue due upon foot of said judgments respectively should be paid out of the funds to be realised in this cause before the other."

The judgment confessed to Emma B. Williamson was in reality entered on the 26th of January 1842; that recovered by Buckley was entered on the 11th of February 1842. These dates were entered in the margin of the records pursuant to statute 3 G. 2, c. 7.

Buckley's judgment was in the Court of Exchequer; Emma Browne Williamson's was in the Common Pleas. According to the form in which judgments are entered in the Exchequer, the record, after the formal commencement, which refers to the Term only, and after the entry of the parties' names, states that in the Term referred to the plaintiff brought his bill against the defendant, "the tenor

of which bill follows in these words, that is to say." It then sets out the declaration, in the very commencement of which it is stated that the plaintiff comes before the Barons of the Exchequer on a certain day mentioned—in strictness the day of the defendant's appearance—and complains by bill against the defendant present in Court the same day, of a plea, &c., setting forth the cause of action. In judgments on warrants of attorney this part of the record follows the form of a declaration in debt. The record of a judgment in the Common Pleas, after the formal commencement entitled of the Term generally and the entry of the parties' names, proceeds at once in the words of the declaration, which in that Court commences merely by stating that the defendant was attached to answer the plaintiff, and thereupon the plaintiff complains that, &c., setting forth the cause of action. In judgments on warrants of attorney it is, as in the Exchequer, a declaration in debt.* Thus, in the Exchequer the day of the supposed appearance and declaration appears in the body of the judgment to be of a certain date after the first day of the Term, which is not so in judgments in the Common Pleas.

Emma Browne Williamson excepted to the foregoing report, insisting that her judgment should have been reported prior to that recovered by Buckley.

Mr. Baldwin, Mr. Hughes and Mr. Norman, in support of the exception.

They relied first upon statute 3 & 4 Vic. c. 105, as having made judgments a charge on the estates of the debtor from the real date of their entry, and argued that absurd consequences would follow if the words "the time of entering up such judgment," the phrase used in the 19th and 22nd sections, were interpreted to mean the fictitious date under the pre-existing law. Thus, suppose the conuzor of these two judgments was seised of lands at the date of the entry of the first, and sold them before the date of the entry of the second, unless the real dates were referred to, the purchaser would be bound by

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* See precedents *Ferguson's forms*, 236, 237 ; *Tidd's forms*, 181, &c.

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both under the 22nd section; and so, the concluding sentence of that section, which prevents a judgment creditor from enforcing his charge in equity until after the expiration of a year from the entering up of the judgment, would, if the fictitious time be referred to, in the case of judgments entered at the end of October, restrict the creditor to little more than six months. A similar absurd consequence would follow in calculating interest under the 26th section; and decrees or orders being, under the 27th and 28th sections, placed on the same footing as judgments, shows that their priority must depend on the true dates, as no fiction is admitted in the case of decrees or orders. They argued that therefore it must have been the meaning of the Legislature to alter the old doctrine of the relation of judgments to the first day of Term, which had in fact been previously abolished by a rule of Court in England, before the passing of the analogous English statute, from which these provisions of statute 3 & 4 *Vic.* c. 105 were copied; and they relied on the general policy of the Act and the obvious justice of such an alteration, as leading to the same conclusion.

They also contended that, even independently of that statute, Buckley's judgment, being in the Exchequer, should be postponed to Miss Williamson's, which was in the Common Pleas; inasmuch as a judgment in the Exchequer shows in the body of it the date of the appearance, before which the judgment could not have been entered, but in the Common Pleas the whole record refers generally to the first day of Term; that the recital contained in the 10th section of the 7 *W.* 3, c. 12, shows that a distinction existed at Common Law between the relation of judgments in the Exchequer and in the other Courts of Law; that in the former, the day of the return of the original being the day of the defendant's appearance, no judgment could before that have been given against him, while in the other Courts the declaration related to the first day of the Term; that thus the priority should be ascertained without travelling out of the record itself: *Swann v. Browne* (a); or having recourse to the entry of the date under the Docketing Act 3 *G.* 2,

(a) 3 *Burr.* 1595.

c. 7, which was only available in favour of purchasers, &c.; and they argued that this might be pleaded even at law: *Morris v. Pugh* (a).

They also referred to statute 7 & 8 Vic. c. 90 (Registry of Judgments), and statute 7 W. 3, c. 12 (Statute of Frauds), and the 32nd section of statute 5 & 6 W. 4, c. 55 (Sheriff's Act), as bearing on the construction of 3 & 4 Vic. c. 105, and cited *Rolleston v. Morton* (b).

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Serjeant Warren, Mr. Brewster and Mr. Molesworth, contra.

They contended that statute 3 & 4 Vic. c. 105, made no alteration in the law as regarded the priority of judgments *inter se*; that that was a subject with which the Act was not at all conversant, its object, as far as judgments were concerned, being only to increase the remedies of the creditors against their debtors, as *ex. gr.*, by enabling the creditor to extend the whole in place of a moiety of his debtor's lands; that there is admittedly no express enactment altering the previous rule, and therefore the words, "at the time of entering up said judgment," must refer to that time which, according to the existing law, was regarded as the time of its entry—viz., the first day of the Term of which the judgment is entitled; that there is no way of ascertaining on the face of a judgment what was the real date of its entry; that the concluding sentence of the 22nd section of the statute shows that it was not the intention of the Legislature "to take away or prejudice any remedy which any such judgment creditor might have had if that Act had not passed," which must necessarily be done if its effect was to alter the priorities in which judgments stood in reference to each other; that if necessary to hold that the true date of the entry was to be regarded for some purposes of the Act, as between the judgment creditor and his debtor or purchasers from his debtor, while the fictitious date, according to the old legal rule, was still regarded as between different judgment creditors, there would be no more inconsistency in so

(a) 3 Burr. 1241.

(b) 1 Dr. & War. 171; S. C. 4 Ir. Eq. Rep. 147.

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doing than had been already produced by the docketing or judgment Registry Acts, which, taken in connection with this Act, must prevent the absurd consequence said to follow under the 22nd section in reference to purchasers; and that the fact that the English statute, from which this portion of the statute 3 & 4 Vic. c. 105 was copied, admittedly made no alteration in the pre-existing English Rule, to suit which it was framed, was an argument to show that this Act should not in this country alter the well-known pre-existing rule: *Robinson v. Tonge (a)*.

As to the other point argued, they said the effect of it would be that in every case a judgment of the Queen's Bench or Common Pleas would be prior to a judgment in the Exchequer entitled of the same Term, although in reality it might be several months subsequent, as might happen between Trinity and Michaelmas Terms; that the same principle, if sound, would affect the priorities of Exchequer judgments *inter se*, but it had always been considered that they all alike had reference to the first day of Term, as was illustrated by the instance of two elegits on judgments of the same Term, under which the whole of the debtor's lands were equally seizable, no matter in what Court the judgments had been entered; and that the novelty of the point showed that it was untenable, as it would have been applicable ever since the Statute of Westminster, if maintainable.

The cause stood over for judgment.

May 31.
Judgment.

RICHARDS, B.

The Master finds that the defendant Emma Browne Williamson, in or as of Hilary Term 1842, obtained in the Court of Common Pleas a judgment against the defendant John Browne Williamson, for the penal sum of £1000 debt, besides £2. 2s. 8d. costs; and that there is due to Emma Browne Williamson, on foot of that judgment, £500 for principal, together with interest thereon from the

(a) 3 P. Wms. 398.

15th of January 1842, being the date of the bond whereon the same was entered; and the Master also finds that the defendant John Buckley obtained three several judgments in the Court of Exchequer in Ireland—one against the same defendant John Browne Williamson, and another against the defendant David B. Williamson, and another against George B. Williamson—for the sum of £700 debt, besides costs; and that said last-mentioned judgments were entered upon the joint and several bond of said defendants John, David and George B. Williamson, bearing date the 9th of February 1842; and that there is due to said John Buckley for principal, interest and costs, including £3 costs of proving his charge before the Master, the sum of £478. 14s. 6d.; and then the Master finds as follows:—"I find that the judgment so obtained by the said Emma Browne Williamson as aforesaid and the judgments so obtained by the said John Buckley having been entered up as of one and the same Term, as hereinbefore mentioned, although the judgment so obtained by the said Emma Browne Williamson was in fact entered before the said Buckley's judgments, are all of equal priority; and therefore that the respective sums so due on foot of said four last-mentioned judgments are in equal priority as aforesaid and the next charge affecting the estate and interest of the said defendants John, David and George Browne Williamson, in the said lands and premises; and that neither of the sums now due or to accrue due on foot of the said judgments respectively should be paid out of the funds so to be realised in this cause before the others." To that finding the defendant Emma Browne Williamson has excepted.

It has been contended on the part of the exceptant Miss Emma Browne Williamson that, her judgment having been in point of fact entered before Buckley's, she ought to be paid in priority to him out of the proceeds of the real and freehold estates of her debtor. On the other hand, it is insisted, on the part of Buckley, that all judgments entitled as of the same Term, no matter at what particular time or times they may have been entered up, must have relation to the first day of the Term, and that there can be no priorities between creditors on foot of such judgments *inter se*.

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Undoubtedly the principle of relation, as insisted on, did prevail at Common Law with respect to judgments, and to the full extent contended for at the Bar; and accordingly a judgment entered up in Vacation bound the lands of the conuzor from the first day of the preceding Term, all judgments entered in Vacation being entitled as of the preceding Term, and that upon the principle that the Vacation was by intendment of law considered as part of the Term which immediately preceded it.

Indeed it was the great and manifest injustice caused by the application of that principle in respect to purchasers, that led to certain of the enactments contained in the Statute of Frauds (7 W. 3, c. 12), the 10th section of which Act recites thus:—“And whereas it hath been found mischievous that judgments in the King’s Courts at Dublin do many times relate to the first day of the Term whereof they are entered, or to the day of the return of the original or filing the bail, and bind the defendant’s lands from that time, although in truth they were acknowledged or suffered or signed in the Vacation time after the said Term, whereby many times purchasers find themselves aggrieved: be it enacted, &c.” Then comes the enactment requiring the Judge or officer who shall sign any judgment, to set down the day of the month and year of his so doing upon the paper, book, docket or record, which he shall sign; and further directing that such day of the month and year shall be also entered upon the margin of the roll of the record where the said judgment shall be entered; and by the 11th section of the same Act it is enacted:—“That such judgments as against purchasers, *bona fide*, for valuable consideration, of lands, tenements, or hereditaments to be charged thereby, shall, in consideration of law, be judgments only from such time as they shall be so signed, and shall not relate to the first day of the Term whereof they are entered, or the day of the return of the original or filing the bail; any law, or usage, or course of any Court to the contrary notwithstanding.”

The 15th section of the same statute directs that the day of enrolment of all recognizances shall be set down in the margin of

the roll, &c., and that no recognizance shall bind lands, &c., in the hands of a purchaser, but from the time of such enrolment.

In connection with this Act I would refer to the 3 *G.* 2, c. 7, commonly called the "Docketing Act," and which was manifestly intended to carry out more effectually the provisions of the 7 *W.* 3, and to do so with justice to all parties. That Act recites the 7 *W.* 3, and the damage not only to purchasers and mortgagees, but also to heirs, executors and administrators of persons deceased, notwithstanding the provisions contained in such former Act, "by reason of the difficulty there is in finding out such judgments, in regard that after the signing such docket or record" (as directed by the 7 *W.* 3) "by any of the Judges or Barons, the plaintiff or his attorney do sometimes keep the docket or record so signed for a considerable time in his custody before the same is brought to the proper Court to be entered on record;" and then the Legislature proceeds to enact that the proper officer of each Court shall mark upon the docket or record of every judgment, as soon as the same shall be brought to the proper office to be entered of record, the day of the month and year that the same shall be so brought into the office to be entered upon record, and that the same day shall be entered upon the margin of the roll of the record when such judgment shall be entered, as well as the day of the month and year when such judgment was acknowledged before and signed by the Judge. The 2nd section is in these words:—"And be it further enacted by the authority aforesaid, that such judgments as against purchasers or mortgagees *bona fide* for valuable consideration of lands, tenements or hereditaments to be charged thereby, shall, in consideration of law, be judgments only from such time as they shall be brought into the proper office to be entered of record and signed by the proper officer on such docket or record as aforesaid, and shall not have any preference against heirs, executors, or administrators, in their administration of their ancestors', testators', or intestates' estates, but from the time aforesaid; any law or statute to the contrary notwithstanding."

The 3rd section prescribes more precisely the duty of the officer in entering judgments and in keeping books for reference, &c., and

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for the purpose of making searches. The former Act (the 7 W. 3) in no way affected the rights of judgment creditors *inter se*, or in respect to the unsold estates of their debtors. The 3 G. 2, however, did affect the relative priority of judgment creditors whose judgments were docketed in pursuance of that Act, as against the heirs, executors and administrators of their deceased conuzors.

It follows therefore that, as between all other parties not falling within either of the foregoing Acts, the doctrine of relation to the first day of the Term, with all its consequences, prevailed as well after as before the enactments contained in those several statutes.

I have endeavoured to ascertain the manner in which judgments are practically entered up, as it is called, in the different Law Courts, and the manner in which the provisions of the two Acts of Parliament to which I have last referred are carried out; and I find that in the Courts of Queen's Bench and Common Pleas, where all interlocutory judgments are enrolled, final judgment is entered on the roll of the interlocutory judgment, although the latter may have been marked several Terms prior to the signing of final judgment. If subsequently, however, such judgment be revived by *scire facias*, the recital in the writ of *scire facias* states the recovery to have been in the Term in which the final judgment was marked, although appearing on the roll of the Term of the interlocutory judgment.

In the Exchequer it is different. Interlocutory judgments are not enrolled, and a judgment in an adverse suit is entered as of the Term of the rule by the authority of which the final judgment is marked, that being considered the award of judgment by the Court. This is so, although that rule may have been obtained in some Term long prior to the actual signing of the final judgment; and a *scire facias* to revive such a judgment recites a recovery as of the Term of the rule for judgment.

As to judgments on warrants of attorney,—the production of the *cognovit actionem* and the docketing or attaching the label to this *cognovit*, signed by the proper officer, which are simultaneous acts, constitute the entry of judgment in these cases; and all such judgments appear on the roll of the Term in which they are signed, which roll contains the entry of the day of the confession of the

judgment, and the day of its being actually signed, on the margin, as directed by the statute.

There is another class of judgments which I should here mention, viz., those under the 1 & 2 *W.* 4, c. 31. Under the 16th section of that Act a Judge at Nisi Prius may order, by certificate endorsed on the record, a judgment to be entered on any day of the Vacation. By another section of the same Act the Law Terms are specially marked out as commencing and ending on certain days; and by the 17th section a judgment entered under that statute is recorded as of the particular day in Vacation on which it is entered, and not as of the preceding Term, according to the former and present practice as to all other judgments entered in Vacation.

I come next to the 3 & 4 *Vic.* c. 105. Now, that Act of Parliament is in some respects a literal transcript of divers provisions contained in certain Acts of Parliament which had previously been passed for England alone; and it undoubtedly is much to be regretted that the variance in the state of the law between the two countries was not more carefully attended to upon the framing of that Act of Parliament than it appears to have been. For example, at the time of the passing of the Irish statute, the relation of judgments entered in Vacation to the first day of the preceding Term prevailed, to the extent which I have mentioned, in this country as fully as ever; while in England the state of the law was in that respect altogether different, and had been so for a period long antecedent to the passing of the several Acts of Parliament corresponding with the 3 & 4 *Vic.*; for, by a General Rule of all the Courts of England (and which the Judges had authority by statute to make) it was expressly ordered that "All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in Term or Vacation, when signed, and shall not have relation to any other day." That General Rule appears to have been made in Hilary Term 4 *W.* 4, viz., 1834 (a), so that when the several Acts of Parliament to which I have referred were made for England, the doctrine of relation *quoad* judgments

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was altogether abolished; and reading the sections in the English Acts, to which I have alluded, with that key to their interpretation, there could be no difficulty with regard to the construction they ought to receive, and no inconsistency between the different sections and the law as it then stood in England.

But the law in Ireland, in regard to the point we have now under consideration, not having been in like manner altered before the passing of the 3 & 4 of *Vic.*, we have unquestionably a difficulty to deal with, and a difficulty which, in my opinion, can only be solved by holding that, as between creditors who obtained their judgments after the time appointed for the Act coming into operation, the 3 & 4 *Vic.* had the effect of impliedly abolishing in this country the consequences resulting from the doctrine of relation *quoad* all such judgments; and indeed unless we so hold, we shall have to construe several sections of that Act not only differently from the construction which the identical same language in the corresponding English statutes must receive, but differently from what appears in my mind to be the plain meaning of the words themselves and the manifest intention of the Legislature.

The Act being so multifarious in its objects, I do not apprehend much weight can be given either to its original title or to the short recitals with which the different sections are prefaced; but it is very manifest that the Legislature intended to make important and, in some respects, radical changes in the law in respect to judgments, and in respect to the rights and remedies of creditors against the property of their debtors. The 19th section commences with this recital:—"Whereas the existing law is defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law." Undoubtedly there is nothing contained in that recital which would indicate an intention on the part of the Legislature to make any change in the law as between judgment creditors *inter se*; but the question to be considered is, whether the subsequent enactments to be found in this statute can be carried out without making that

change? By the same section, when a writ of elegit is issued, the Sheriff is to deliver the whole, instead of a moiety, of the lands, &c., which the conuzor or any person in trust for him shall have been seised or possessed of "at the time of entering up said judgment," or at any time afterwards, &c. I think it would be difficult to construe these words, "at the time of entering up said judgment," to mean *not* the time of entering up the judgment, but some other time. Thus, when a judgment was entered on the first of November on a bond executed on that day, in common parlance, one would say the time of entering up such judgment was the first of November, and not any earlier day; and I confess I cannot understand upon what principle I would be justified in saying, either in point of fact or in point of law, that the time of entering up such a judgment, according to the true intent and meaning of this Act, was the first day of the preceding Trinity Term, and not the first of November. This section, it will be observed, makes a very great change in regard to the powers conferred on judgment creditors for the purpose of recovering their debts. It enables the creditors, as I have mentioned, to take the whole, instead of a moiety, of the debtor's lands. It enables the creditor to seize lands, &c., over which the conuzor had, "at the time of the entering up of such judgment," or at any time afterwards, any disposing power which he might, without the assent of any other person, exercise for his own benefit. Those are new and very extensive remedies, and it would be rather too much to hold that every species of property made liable to an execution within that section was by a fiction to be bound, not from "the time of entering up the judgment," but from a long anterior period.

A very important alteration is here made with regard to the Statute of Frauds. By that statute a creditor was only entitled to extend under his elegit the lands held in trust for his debtor "at the time of the said execution sued;" but now all such trust estates are, by force of this 19th section, bound from the time of "entering up the said judgment." I ask then, are we to hold that the time of "entering up the said judgment" does not mean the true and real time, but a previous fictitious period? I apprehend it never was

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the intention of the Legislature to make so very unjust and mischievous an alteration in the Statute of Frauds. It certainly was a grievance, before the passing of this Act of *Vic.*, that trust estates as well as other estates should not have been bound from the actual time of the entering up of a judgment; because, as the law stood in that respect under the Statute of Frauds, it would have been competent for a debtor to have defeated the rights of his judgment creditors in respect to his trust estates altogether, by procuring his trustee to convey away the lands of which he, the conuzor, was the *cestui que trust*, at any time before execution actually issued, such estates being only bound from that period according to the provisions of the Statute of Frauds. The 19th section, however, of 3 & 4 *Vic.* corrects that evil. But I cannot understand that it ever was intended, by ingrafting into that section the principle of relation, to create a still greater evil by making trust estates bound, not merely from the actual time of entering up a judgment, but from the first day of the Term as of which such judgment may be entitled, so as to enable a judgment creditor in that way to overreach all intermediate conveyances to purchasers or mortgagees, &c. It is manifest this Act of Parliament never could receive an interpretation by any Court of Justice so little in accordance with its language and objects, and so unjust in its consequences and so utterly at variance with the principle upon which some of the most important and wholesome provisions in the Statute of Frauds are founded.

But again: by the 22nd section of the 3 & 4 *Vic.*, it is enacted that a judgment shall operate as a charge upon all lands, &c., of which the conuzor shall, "at the time of entering up such judgment, or at any time afterwards, be seised or possessed," &c.: "and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment." This section then enacts, "that every judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been entered up had power to charge the same hereditaments, and had by writing under his

hand agreed to charge the same with the amount of such judgment debt and interest thereon." It is sufficient to read the foregoing extract from this section to show that the true and real time of entering up a judgment is made material; and it is quite impossible to imagine that this 22nd section of the Act was intended to refer to any fictitious time founded on the doctrine of relation to the first day of the Term, &c., instead of the true and real time of the entering up of the judgment. If the doctrine of relation is still to prevail, as contended for, I would ask, from what time is the interest chargeable on a judgment under this section to be calculated? Is it from the true or fictitious time of entering up the judgment? I apprehend it cannot be from the latter; neither could a judgment be deemed a charge, or dealt with in a Court of Equity as such, under this section, by any fiction of law, from a period anterior to the true time of the entering up of such judgment.

Again: this 22nd section provides that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of his judgment as a charge under the Act, "until one year from the entering up of such judgment." Now, is that year to be calculated from the true time of entering up the judgment or from the first day of the Term of which it is entitled? Manifestly from the true time; it is unnecessary to point attention to the numerous absurdities that would result from a contrary construction.

It has been said, however, that the construction which in our opinion the language used in those sections ought to receive would necessarily require that a retrospective and unjust operation should be given to the Act, inasmuch as the 19th and 22nd sections are both conversant as well about judgments entered up before as well as after the Act, and indeed the 22nd section in express terms includes in its provisions judgments "already entered up." Upon that subject it must be admitted that for most purposes the Act is retrospective as well as prospective in its operation, and unquestionably relates to judgments existing at the time of the passing of the Act, and it would be very defective if it did not. Whether it is so or not in regulating the rights of judgment creditors *inter se* is quite a different question; but the two judgments which we have to deal with

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in this case were both entered subsequently to the Act coming into operation ; and if we are right in the construction we are about to put upon this statute, those judgments were at no time equal in point of priority. We are therefore not displacing any priority which Buckley's judgment ever had with reference to the other ; nor are we required in the case before us to give the Act in that respect any retrospective effect. But while upon this subject, I would refer to the concluding provisions in the 19th and 22nd sections, which appear to me sufficient to control the construction which the Act might, upon this point, otherwise receive in respect to judgment creditors being or becoming such before the commencement of the Act.

Indeed it has been argued that the concluding proviso in the 22nd section is of so very general and comprehensive a character—providing as it does “that nothing in this Act shall take away or prejudice any remedy or proceeding which any judgment creditor may, or if this Act were not passed, might have or take in relation to his judgment,” &c.—that we are precluded from giving the Act a construction which would in any respect affect, not the remedies only, but the rights, whether relative or otherwise of judgment creditors, whether their judgments were entered before or after the Act. Now, without pretending to define all the cases to which that proviso was intended to apply, or what construction is to be put upon the words “remedy” and “proceeding” as used in that part of the Act, it is manifest that the proviso was in part intended to apply to creditors who, as to the extended remedies provided by the 22nd section, were to be tied up for one year. But though it may be admitted the proviso was not *quoad* “any remedy or proceeding” confined to such creditors alone, I yet cannot, I confess, arrive at the conclusion that it is to have the effect of controlling the several other parts of the Act, at least to the extent contended for.

I pass now to the 26th section, which enacts that every judgment not being for a penal sum shall carry interest at £4 per cent. “from the time of the entering up the judgment,” &c., and I ask is that to be the true or fictitious time of entering up such judgment?

The 27th section enacts that decrees, orders, &c., of the Courts of Equity and the Superior Courts of Common Law shall have the effect of judgments, and that creditors thereunder shall have all the remedies thereby given to judgment creditors. Now those rules or orders will also carry interest, and will carry such interest from the period of their having been pronounced or entered up.* I would ask again are those rules and orders, though duly registered under the 28th section of the Act, to be overreached by a judgment in point of fact entered subsequently, but entitled as of a preceding Term? I can only say I should be slow to give the Act that construction.

While upon this subject, it may not be unimportant to observe that long before the passing of this Act a priority was given as between judgment creditors *inter se*, not only in the administration of real and personal assets under the 3 & 4 G. 2, c. 7, to which I have already referred, but even during the lifetime of the debtor, in all cases where recourse is had to proceedings under the 5 & 6 W. 4, c. 55, commonly called the Sheriffs' Act, which has in practice almost altogether superseded the writ of *elegit* in this country. Now by the 32nd section of that Act the Court is empowered in administering the income arising out of the debtor's estate to direct that the same shall be applied according to the priority of each judgment, as ascertained by the date of the entry thereof. So that after all, we are not, by the construction we are disposed to put on the 3 & 4 Vic., about to make so great an innovation in the law in regard to the relative priority of judgment creditors as might at first view be supposed.

With respect to the 7 & 8 Vic. c. 90, being the Act now in force in this country for the registration of judgments, decrees, orders, &c., I have omitted any allusion to it; inasmuch as the judgments we have to deal with were entered up intermediately between the 1st of November 1840, the time when the 3 & 4 Vic. c. 105 came into operation, and the 1st of November 1844, when the new registry was

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*See the forms settled by the English Judges, Nos. 2 & 8, 5 Mee. & Wels., pp. 845, 860, note; *Lidwell v. Lidwell*, 7 Ir. Eq. Rep. 91.

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opened under the late statute, and consequently that statute does not appear to me to have any distinct bearing on the exact question we have had under our consideration, though it makes most important alterations in the law in respect to the *modus operandi* of recording and registering judgments in Ireland.

Another ground of argument was also relied on by the Counsel for the exceptant, namely, that Buckley's judgment, being a judgment of the Court of Exchequer, contained upon the face of the record internal evidence that it could not in fact have been entered on the first day of the Term as of which it was entitled; that therefore it could not by any intendment of law be referred to that day, and that therefore it must necessarily be considered as a judgment entered subsequently to the exceptant's. Now with respect to that argument we are far from intending to intimate that there may not be a great deal of reason and of law in support of the position so advanced, and that the reasoning addressed to us on that subject may not be well deserving of attention; but having formed our opinion upon the other and more important ground upon which the case has been argued, we think it unnecessary to express any opinion upon this latter point.

Upon the whole we are of opinion that the exception must be allowed.

Jan. 25.

A testator devised to his sons to be disposed of as after mentioned all his estate in W., and to the survivor, &c., of his sons, and all his estate in P., subject to his proportion of the head-rent, and also subject to and in trust to pay out of the rents thereof an annuity to his daughter, and the remainder of the rents until she should be paid a sum of £500. Then followed a bequest of an annuity of £40 charged on parts of W., and there was a residuary devise to the three sons. *Held*, that the bequests to his daughter were charged only on P. and not on any of W.

William Williamson made the following will:—

"I, William Williamson, of, &c., do make this my last will and testament. I devise and bequeath to David B. Williamson and to John B. Williamson and George B. Williamson and to the survivors and survivor of them, all my estate and interest in the house and lands and premises called Williambrook, as now in my possession, being part of the lands of Leiffin, Crinkell and Clonoughell, in the parish of Birr and King's County, and all my holdings in the lands

of Crinkell and Leiffin aforesaid, save the part thereof which I purchased from Benjamin and Robert Hammond, and which I have disposed of as after mentioned; I devise and bequeath unto said David, John and George B. Williamson all my estate and interest in the several houses, lands and premises at Phillipsburgh, in the county of Dublin, now tenanted by, &c.—[naming the tenants]—and the several houses and premises in the North-strand, and all such other parts of the lands, houses and premises in the lease of all said lands and premises from William Phillips to Robert Browne, and in the new lease or renewal obtained thereof by William English, as I am or shall appear entitled unto in the cause and proceedings depending between said English and me respecting same, and all my estate and interest in said several premises, subject to my proportion of head rent, and to the survivors and survivor of the said David, John and George, their heirs, executors, administrators and assigns; and also subject to and upon trust to pay out of the rents and profits thereof the sum of £30 per annum to Emma B. Williamson for her life, half-yearly from my decease, and also to pay said Emma the remainder of the rents, issues and profits thereof from my decease until paid the sum of £500, with interest from my decease.” Then followed a devise to David, John, George and Emma Williamson of a seat in Birr church, and the will proceeded:—“I do hereby devise and bequeath to Mary Cooper and her daughters, &c., and the survivors and survivor of them, all my estate and interest therein of all that part of the lands of Leiffin, houses and premises purchased by me from Benjamin and Robert Hammond, held under a lease for lives renewable for ever, subject to the head-rent of £2. 10s. late currency and half a year’s rent renewal fine, part of which premises are tenanted by, &c.—[naming the tenants and their rents]—with a waste plot of ground and any house or building I may build thereon, and the cabin, ground and premises adjoining and belonging to the original holding, formerly called L. G.’s holding. I bequeath to M. O’Brien £40 per annum for her life, payable out of my said King’s County property, tenanted by S. B. and E. M., part of Williambrook aforesaid.” Then followed a residuary bequest to David, John and

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George Williamson, subject to certain pecuniary legacies; and David, John and George were appointed executors.

The testator held the King's County property for an estate for lives renewable for ever, subject to a head-rent. He held the premises on the Strand under leases for years, of which about twelve years were unexpired at the date of his will. The Phillipsburgh premises he had held under a lease of which about twelve years were also unexpired at the date of his will; but he had sold the greater part of them to English several years previous to his death, reserving only a small portion to himself, and had conveyed his interest to English and taken a re-demise from him of this smaller portion. English afterwards obtained a new lease from the head landlord for a very long term, subject to an increased rent, and the testator claimed the benefit of this new lease as to the smaller portion, subject to a proportional part of the increased rent; which claim was the subject of dispute between him and English referred to in the will.

The testator was an attorney; David, John and George were his sons, and Emma his daughter. The Phillipsburgh and Strand premises were soon after his death sold to pay arrears of head rent and some debts; and David, John and George obtained renewals of the King's County property and mortgaged it to the plaintiffs. Miss Williamson claimed against the King's County property the annuity of £30 a-year and the £500 bequeathed to her; which claim the plaintiffs resisted, on the ground (amongst others) that the King's County property was not subjected to these charges on the true construction of the will.

The Master having reported in favour of the plaintiffs on this ground, Miss Williamson excepted to the report.

Argument. Mr. Baldwin, Mr. Hughes and Mr. A. Norman, in support of the exception.

Mr. Serjeant Warren, Mr. Brewster and Mr. Molesworth, contra.

RICHARDS, B.

Judgment. We are all of opinion in this case that the report of the Master

is correct, and that the exception must be overruled. We think that the devise of the King's County property is in itself a perfect and independent devise, and that no words of limitation were necessary to complete it.

It appears that the Phillipsburgh property was held under Mr. English, but that at the same time Mr. English was a person who held himself under another; the words therefore "proportion of head rent" would properly apply to the Phillipsburgh property, which was held along with several other farms, the proprietors of which were bound to contribute to the expenses of renewals obtained by Mr. English, and for the same reason would be totally inapplicable to the King's County property, of which the testator paid the whole head rent himself. Then the words "all my estate and interest in said several premises" must apply to the chattel interests alone. The words "head rent" are also in the singular number, showing that they refer to the chattel property only; and the words "survivor and survivors" must receive a similar application. Then comes the bequest of the annuity to Mrs. O'Brien, which is quite inconsistent with the intention contended for in support of this exception; for if it was the intention of the testator to throw the burthen of both annuities on the King's County property, the result would be that the annuities bequeathed to Mrs. O'Brien and Miss Williamson would have exhausted this property and left no provision for the rest of his children during the lifetime of these parties. We cannot conceive that the testator, who was a professional man, would have given his property to persons who could derive no benefit from it for such a length of time, or that it could ever have been his intention to postpone all provision for these children to an indefinite period, which would be the necessary result of the construction contended for here. We are, therefore, of opinion that, on this point the Master has arrived at a correct conclusion.

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Reg. Lib. 98, fol. 286, 1848.

Reg. Lib. 99, fol. 172, 1848.

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BEFORE THE LORDS COMMISSIONERS.*

Jan. 24.

Two brothers, OLIVER and Edward Walsh, being both carpenters and builders, who were builders, but entered into an agreement dated the 28th of December 1842. It was made between Edward and Oliver Walsh, both described as of Great Brunswick-street in the city of Dublin, of the one part, and Archdeacon Barton of the other part. It recited that it had been agreed between the parties that Barton should demise unto said Oliver and Edward Walsh, their executors, administrators and assigns, and said Oliver and Edward Walsh, their executors, administrators and assigns should accept of such demise of, a plot of building ground in Suffolk-street, to hold unto the said Oliver and Edward Walsh, their executors, administrators and assigns, for and during the term of ninety-nine years, to commence and be computed from the 25th day of March 1844, at the yearly rent of £126, upon the following terms and conditions—viz., the lease to contain the usual clauses and covenants between landlord and tenant, with a clause of view and covenant to keep the premises regularly insured; and that said Oliver and Edward Walsh were in the meantime to build, or cause to be built, three dwelling-houses forty feet high or thereabouts from the level of the street, each house about twenty feet frontage, same to be built of sound materials and executed in a proper workmanlike manner, and be fully finished and inhabitable on or before the 1st of July 1844, to the satisfaction of said Edward Barton, his executors, &c., or their agents; and when the three houses should be built up as aforesaid to the drawing-room story and joists laid for that story, and never took any part in it, or advanced any money, the houses being completed by the other brother. *Held*, that the representative of the deceased brother had no equity to claim a share in the houses, and that the right of survivorship should not be interfered with.

* Heard before RICHARDS, B., JACKSON, J., and MOORE, J.

said E. Barton should advance to said Oliver and Edward Walsh the sum of £250; and when said three houses should be roofed, another sum of £250; and when the stairs should be up and the floors all laid in said three houses, a further sum of £250 more; and when the houses should be fully finished and ready for occupation, a further sum of £250 more; which said several sums make together the sum of £1000: the remaining part of the building of said three houses to be paid by and at the expense of the said Oliver and Edward Walsh, their executors, administrators and assigns. And in consideration of the premises and for nominal considerations, Oliver and Edward Walsh did, and each of them did, for themselves and himself and his and their respective heirs, executors, administrators and assigns, covenant with E. Barton, his heirs, executors, administrators and assigns, that they the said Oliver and Edward Walsh, their executors, administrators and assigns, should and would, on the said 25th day of March 1844, take out and perfect at his or their own costs, from said E. Barton, his heirs, executors, administrators or assigns, a lease and counterpart of lease of said premises at the said yearly rent of £126; and that said lease should contain the specified covenants; and that they should in the meantime build, or cause or procure to be built, three dwelling-houses on said premises forty feet high or thereabouts from the level of the street, and each house about twenty feet frontage, and that each house should be built of good sound materials and executed in a proper, good, permanent and workmanlike manner, and be finished and fit for habitation on or before the 1st of July 1844, to the satisfaction of said E. Barton, his executors, &c., or his agents; and E. Barton did for himself, his executors, &c., covenant with Oliver and Edward Walsh, their and each of their executors, administrators and assigns, that he the said E. Barton, his heirs, executors, &c., should and would well and truly pay or cause to be paid unto said Oliver and Edward Walsh, their executors, administrators or assigns, the just and full sum of £250 when and as soon as said three houses, so to be built upon said ground, were built up to the drawing-room story, and joists laid for that story; and when and so soon as said three houses were

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roofed, one other sum of £250 more ; and when the stairs were up and the floors were all laid in said three houses, another sum of £250 more ; and when the said three houses were finally and fully finished and ready for occupation, a further sum of £250 more, which several sums make together the sum of £1000: and Oliver and Edward Walsh did thereby, for himself and for themselves, his and their executors, administrators and assigns, covenant with E. Barton, his heirs, &c., that they the said Oliver and Edward Walsh, their executors, administrators and assigns, should and would from time to time, and at all times thereafter, expend, or cause to be expended, the said several sums of money to be received by them from time to time, upon the building and erection of said three dwelling-houses upon the premises aforesaid, and to be thereafter demised to them ; and further, that they the said Oliver and Edward Walsh, and their executors, administrators and assigns, should and would of himself and themselves supply the deficiency or balance of the money required and necessary for the completing the building or erection of said three dwelling-houses upon said ground, to the full and perfect satisfaction of him the said E. Barton, his executors, &c., or his or their agents, as therein before agreed upon. There were some other covenants, which it is not material to mention. Concurrently with the agreement, the Walshes gave the security of two other persons as their sureties for the faithful performance of it on their part.

At the date of this agreement both the Walshes, who were brothers, had the same place of business in Brunswick-street ; but it did not appear that there was any general partnership between them.

Immediately after the making of the agreement, the ground was taken possession of, and some old building materials of trifling value, which were upon it, were sold by Edward Walsh, the defendant. Very soon afterwards a dispute arose between Oliver Walsh and the agent of Barton the landlord as to the quantity of ground intended to be included in the agreement, and he refused to proceed with the building, in consequence of which nothing further was done for some time in performance of the contract.

On the 18th of July 1843, the solicitors of Archdeacon Barton served on Oliver and Edward Walsh a notice, insisting that they had got the full quantity of ground stipulated for, but offering to rescind the original agreement on the terms of the Walshes within a week giving up possession of the ground; and apprising them that if they did not give up the premises within a week, they should not be at liberty afterwards to rescind the agreement, and they and their sureties would be held liable, and proceedings be taken against them to enforce it.

Soon after this, viz., in September 1843, Edward Walsh alone proceeded with the building; and out of his own means, and with some money he borrowed and the sums advanced by Archdeacon Barton under the agreement, completed the three houses, which were finished in June 1844, and were let by him on advantageous terms.

Soon after July 1843 Oliver Walsh was attacked with a fever, and went to the country, where, being in embarrassments, he continued for some months. He returned to Dublin early in 1844. About March 1844 he went to London, where he continued until the following August. When he returned to Dublin his intellects were affected, and he had a violent altercation with one of the tenants, to whom Edward Walsh had let one of the houses then just completed; and being summoned to the police-office for this transaction, he was sent as an insane person to the Richmond Lunatic Asylum. He continued confined in this asylum until the 10th of April 1845, when he was discharged as recovered; but on the evening of the day of his discharge he died.

During the entire of the period from July 1843 to his death, Oliver Walsh took no part in the building of the houses, and gave no assistance whatever to his brother; nor did he, during the progress of the work, assert any right under the agreement, except that in February 1844 he caused a notice to be served on Archdeacon Barton, calling on him to register it. During the same period he wrote some letters to his friends, from whom Edward Walsh was about to borrow some money to enable him to proceed with the building, in which he charged Archdeacon Barton with

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not having performed his agreement, and treated the speculation as one likely to prove, if persevered in, very imprudent and unprofitable, and discouraged them from lending the money.

Immediately before his death Oliver Walsh made a will, by which he purported to bequeath his interest in the premises to the plaintiff, whom he appointed his executrix. The will was litigated in the Ecclesiastical Court by Edward Walsh, on the ground that the testator was insane; but it was established and probate granted to the plaintiff, who soon afterwards filed the bill in this cause against Edward Walsh.

The bill insisted that the agreement was a partnership speculation, and that therefore Oliver Walsh's interest did not survive to his co-tenant, but passed to her as his representative, and prayed for a declaration of her rights accordingly, and the consequent accounts.

Argument.

Mr. *Hughes* and Mr. *Wiley*, for the plaintiff.

They argued that the premises were taken as a partnership speculation between the two brothers, the £1000 being lent to both for the purpose of prosecuting it; and that the case was within the ordinary rule, by which equity, in favour of the representatives of a deceased partner, prevents the legal effect of survivorship in property held in joint tenancy, for partnership purposes: *Sugden V. & P.* 902, and the authorities there cited. They contended that the circumstance of Oliver Walsh not having been active in prosecuting the speculation, did not fundamentally affect his rights, and could only lessen his share of the profits on taking the partnership account; that his refusal to co-operate at the commencement of the work was accounted for by his desire not to prejudice the rights which he thought he had against the landlord; that he was soon afterwards rendered incapable by unavoidable absence and ill health, which continued until his death; and that the notice served by him on the landlord plainly showed he did not intend to abandon his claim, which the defendants' disputing the will confirmed, as the deceased had no other property.

Mr. *Baldwin*, Mr. *Fitzgibbon* and Mr. *Lawless*, for the defendant.

They contended that the conduct of Oliver Walsh amounted to an absolute abandonment and repudiation of the agreement: *England v. Curling* (a); that when he had repudiated it his representatives could not insist on it; that the mere fact of a joint contract did not establish a partnership, so as to let in the rule relied on; and that, even if it was otherwise, the rule by which equity controls the rights which a surviving joint tenant indisputably has at law, rests on the injustice which would follow from allowing him to have all the benefit of what had been contributed by the deceased partner, and therefore could not apply in a case like this, where the deceased had really contributed nothing, but had rather endeavoured to impede the speculation in which a share was now claimed for him. They cited *Norway v. Rowe* (b); *Jeffereys v. Small* (c); *Elliot v. Brown* (d); *Dale v. Hamilton* (e).

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The title of the plaintiff to relief rests altogether on the allegation, which is to a certain extent borne out by the instrument, that the taking of these premises was a joint speculation between the two brothers; that is, that it was for their joint profit. Such appears to have been, no doubt, the original character of the transaction, and that is fairly conceded by the defendant in his answer. But after that Oliver, one of the joint speculators, died, and this bill is brought by his representative to enforce a claim against the other.

Judgment.

It is plain that if that which ought to have been done had been done, viz., a lease taken of the premises in question, then all the legal interest under it would now be vested in the defendant Edward Walsh. The personal representative of the dead brother calls on the Court to interfere and prevent this legal consequence taking place. Her claim to the assistance of the Court is put on the grounds that

(a) 8 Beav. 120.

(b) 19 Ves. 144.

(c) 1 Vern. 217.

(d) 3 Swanst. 489.

(e) 5 Hare, 369.

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this agreement was for a joint speculation—that the transaction was in fact a partnership. The cases cited very clearly show that if the intention was that the property should be managed and enjoyed as a partnership matter, a Court of Equity will control and prevent what otherwise would be the legal effect, the right of survivorship. But has the plaintiff here any right to claim such an equity? The original intention was to form a partnership; but has that ever been carried into effect in such a manner as to entitle the plaintiff to treat the speculation as being still a partnership transaction? What occurred in the lifetime of Oliver Walsh, whom the plaintiff represents, warrants no such conclusion, but the contrary. From the very commencement his conduct was the very opposite of what it should have been if he intended to act as a partner fairly. He cannot be allowed to play fast and loose in his attempts to obtain from the landlord what we must now assume he had no right to, and respecting which he wished to involve his brother in the dispute. Time was important, for that was so stipulated in the contract; and unless Edward had stepped forward and undertaken this business himself, no benefit would have been derived from it, but the contrary. Edward then came forward, and by Oliver's letters we find that he not only did not join with or assist Edward, but actually wrote to prevent a loan being made to him.

We do not say what might be the effect if Oliver were alive and offered to bear his part of the burden. All we decide is, that after such conduct his representative has no equity to call on the Court to prevent the operation of the rule of law.

I have alluded to only a part of Oliver's conduct, but there is more in the case supporting the same view of it. I shall only add that on looking to the agreement I find one clause which made it the more important that both should join in working out the undertaking—I allude to the clause respecting joint advances. Oliver never advanced one shilling.

The bill must therefore be dismissed with costs.

The other Judges concurred.

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M'CARTHY v. DAUNT.

BEFORE THE LORDS COMMISSIONERS.*

Feb. 5, 8.

THE bill in this case was filed in 1848, to raise the sum of £400 alleged to be charged on the lands of Kilcascan. It stated that William Daunt being seised in fee-simple of the lands of Kilcascan, in the barony of the west division of East Carberry, in the county of Cork, by his marriage settlement executed in the month of June 1775, "charged or entered into some contract or covenant to charge" those lands, amongst others, with the sum of £600 for the younger children of the then intended marriage, subject to a power of appointment thereby reserved to William Daunt; as appeared from the recital of this deed (which was not forthcoming) in the indenture of 1793 next mentioned.

William Daunt, upon the occasion of the marriage of his daughter Elizabeth Daunt with Francis M'Carthy, the plaintiff's father and mother, by indenture made the 30th of September 1793, which was never registered, after reciting "that by a certain deed of marriage settlement made on the marriage of the said William Daunt with the said Jane Gumbleton, in or about the year 1775, the said William Daunt was thereby empowered to limit, appoint and charge the lands of Kilcascan in said county, with other lands therein mentioned, with a sum of £600 for the younger children of the said marriage," in pursuance of such power, thereby charged and incumbered these lands with the sum of £400 for the marriage portion of Elizabeth Daunt; and the sum of £400, part of the said sum of £600, was thereby assigned to John Rashleigh and Roger O'Connor, their executors and administrators, "upon the following trusts, that is to say, from and after the solemnization of said intended marriage to permit and suffer the said Francis M'Carthy and Elizabeth Daunt, during their joint lives and the life of the survivor,

A upon the marriage of his daughter charged by deed in 1793 upon lands a sum of money, which by the same settlement was assigned to trustees, to permit the husband and wife to receive the interest during their lives and after their decease to pay the principal amongst the children, as the parents or survivor of them should appoint. There was no clause empowering the trustees to give discharges. The surviving parent died in 1845. No payments appeared to have been made by the owner of the lands subsequent to 1826. Held, that the charge was not barred by the Statute of Limitations, there being no person capable of giving an effectual discharge for the principal until the death of the surviving parent.

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to receive and make use of the interest and profits thereof, and from and after the decease of the survivor of them upon trust to pay and dispose of the said sum of £400 to and among the issue of the said Francis M'Carthy and Elizabeth Daunt in such manner as the survivor of them should by deed or will direct, and for want of such direction to be equally divided between such issue."

There were the plaintiff and several other children issue of the marriage.

Francis M'Carthy died in November 1838; and his widow died in January 1845, without having made any appointment of the £400 amongst her children.

William Daunt the settlor died in 1807, leaving Joseph Daunt his eldest son and heir-at-law, who died in 1826, leaving the defendant William O'Neill Daunt his eldest son and heir-at-law, who was now entitled to the lands charged.

William O'Neill Daunt, the principal defendant, by his answer denied all knowledge of the deed of 1775 and its contents, but admitted that "he had heard and believed that some charge was created by some indenture bearing date on or about the year 1775, and that the same was paid off and discharged several years ago;" and referred to the memorial of the deed, in which no such power was set forth. He insisted upon his right, as a purchaser under the marriage settlement of his father and mother in 1806, by which the lands were limited to the first and other sons of the marriage. The defendant also relied on the Statute of Limitations, upon the ground that on the plaintiff's own showing a present right to receive the principal sum of £400 would have accrued to John Rashleigh and Roger O'Connor, the trustees, upon the execution of the indenture of 1793.

The only evidence in relation to payments on foot of the charge given by the plaintiff was statements of Joseph Daunt, that he paid interest money to Francis M'Carthy on account of a charge the latter had on the property of the former; and that Joseph Daunt paid £40 yearly to a Mr. Cotter, who had purchased from M'Carthy an annuity to that amount, out of the charge on Daunt's estate.

Mr. *Longfield*, Mr. *Christian* and Mr. *Herrick*, for the plaintiff.

Mr. Serjeant *Warren*, Mr. *Hughes* and Mr. *Henderson*, for the defendants.

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JACKSON, J.

In this case the plaintiff filed the bill stating a settlement to have been executed in the year 1775, whereby William Daunt settled certain lands, and alleging that a power was reserved in that deed to William Daunt the settlor to charge part of the lands called Kilcaskan with a sum of £600; she further states a settlement of the year 1793, by which £400, part of the sum of £600, was appointed; and prays that an account may be taken of what is due on foot of this sum of £400, and that it may be declared well charged on the lands of Kilcaskan, and further prays a sale of these lands for satisfaction of that portion of the charge. We intimated on a former day, when this case was before the Court, that if no other question should arise but that one as to the contents of the deed of 1775, we should put that question in the course of investigation; but the defendant, by his answer, not only denied that the deed of 1775 contained any such power, but he also relied on other defences, and, at the hearing of the cause, especially on the bar of the Statute of Limitations. We then also intimated an opinion that there should not only be a hand to pay, but likewise a hand to receive, in order to allow the Statute of Limitations to operate; that is, in other words, there should be a party entitled to receive and also capable of giving a valid and effectual discharge. We have considered the defence of the Statute of Limitations, and are of opinion that it does not apply in the present case, for there was no person entitled to receive and capable of giving a valid discharge for this sum during twenty years before the filing of the present bill or even till the year 1845. This is plain from the terms of the deed of 1793.

By looking at what the trusts of this latter deed were, we shall see whether the trustees could have filed a bill before the year 1845, for the purpose of raising this sum. The tenor of that deed is material to be considered. The trusts of it, in relation to this charge are as follow—[His Lordship read the trusts as *ante*, p. 29.]

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It appears to us from the terms of this deed that the trustees were not enabled to give an effectual discharge while the persons having the beneficial interest for life were in existence; their duty did not arise till after the death of the survivor of the tenants for life, and the trust does not come into operation as to the principal until after the death of the tenants for life. Independent of the tenor of this deed the trustees could not be considered guilty of laches in not having filed a bill for a sale.

My Brother MOORE called our attention to the provisions of the 10th section of the 7 & 8 Vic. c. 76, by which it was enacted "That the *bona fide* payment to and receipt of any person to whom any money shall be payable upon any express or implied trust or for any limited purpose shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security." This statute was repealed the year following by the 8 & 9 Vic. c. 106, and the state of the law in relation to this subject was thereby remitted to its former condition. It would therefore be difficult to say that an effectual sale could have been had under this deed with which a purchaser could have been satisfied, without obtaining a valid discharge upon payment of his purchase money.

There remains still the other ground of defence, namely, that the settlement of 1775 did not contain any clause empowering William Daunt to charge this sum upon the lands. It appears to us however that the acts of the parties show throughout that those lands were settled, and that William Daunt had the power relied on. The answer of the defendant denies there was a deed of the precise date alleged; but he admits there was a deed of some date; he likewise admits payments to have been made, but says they were sufficient to discharge the whole demand. The whole tenor of the defendant's answer, therefore, in fact demonstrates that the deed contained a power to charge this sum. The evidence of payments is however not very complete, and we think that we ought to direct an inquiry in the Master's office as to whether the deed contained a power to

charge as alleged by the plaintiff, and if so, whether any and what sum is due to the plaintiff on foot of her demand.

MOORE, J.

In this case I fully concur in the observations that have been made by my Brother JACKSON, and Master BROOKE has authorised me to state that he is of the same opinion. There is no difficulty whatever in the suit but that which arises from the Statute of Limitations. Now, in order to bring this charge within the operation of the 40th section of the 3 & 4 W. 4, c. 27, two things must be found concurring; there must be a hand to receive as well as a hand to pay, and the party to receive must be capable of releasing and giving a discharge. These ingredients are wanting here. The charge was originally created by the deed of 1775: Mrs. M'Carthy as one of the younger children became entitled under an appointment made in 1793 to the greater portion of it. Except with her consent the sum could not be appointed to trustees. It was, however, appointed with her consent to trustees subject to her life interest. The question is, what were the actual rights of the trustees?

Unless the Court is coerced by the positive words of the deed, it would not give it the construction which would have the effect of barring the rights of the unborn children. I think that the construction put upon the instrument by my Brother JACKSON is correct: viz., that this sum was to remain a charge on the land during the life of the tenant for life, and that there was no delegation to the trustees to receive it during her life; but that upon her death in 1845 the right to receive the money accrued to them, and not until then. It appears to me, therefore, that the trustees were not the hand to receive this money during the lifetime of the tenant for life, and that therefore the Statute of Limitations did not commence to run until the year 1845. In order to bring the case within the operation of that statute there must be a power in the person who is to receive the payment also to give an effectual release. It is well settled that a trustee, where there are *cestui que trusts*, is not capable of giving an effectual discharge without their concurrence, and it is the common practice in bills to bring both the trustee and the *cestui que trust*

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before the Court. There are many cases where, though the trustee is the person to give the receipt, yet the purchaser will be bound to look to the application of the purchase-money, and in such cases the purchaser cannot safely pay the money without the assent of the *cestui que trust*. Indeed one of the objects of the statute of the 7 & 8 Vic. c. 76, already referred to by my Brother JACKSON, was to remedy that difficulty, and to allow the receipt of the trustee alone to be a sufficient discharge for the trust-money, unless the instrument defining the trust contained a provision against the sufficiency of it. In my mind that statute amounts to a clear legislative expression of what was before the settled principle of Courts of Equity: namely, that the trustee, without the concurrence of the *cestui que trust*, could not give a valid discharge. I therefore concur with JACKSON, J., and think that the plaintiff is not barred, provided the other question should be decided in her favour.

A doubt, however, has been raised on the evidence as to whether the power to charge extended over that part of the land in the possession of the defendant; but we are all of opinion that a ground for an inquiry has been established, and if it turn out (as my own impression on the evidence is, it will) that it is charged on these lands, the plaintiff, as one of the younger children, would be entitled.

I think that instead of granting an issue where the sum involved is so small, it will be better to direct an inquiry to the Master, and if he thinks there is a power in the deed to charge the portion on these lands, let him take an account of the sum due to the plaintiff.

Reg. Lib. 98, fol. 362, 1848.

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FETHERSTONE v. MITCHELL.

BEFORE THE LORDS COMMISSIONERS.*

Feb. 5.

June 24.

THOMAS MITCHELL being seised in *quasi* fee of certain lands in the King's County, under a lease for lives renewable for ever, at the yearly rent of £121 late Irish currency, subject to a jointure of £80 per annum like currency, payable to his mother Sarah Mitchell, confessed a judgment to Hubert Kelly in Easter Term 1825 in the Court of Exchequer for the penal sum of £498.

By his marriage settlement, executed on the 19th of July 1830, Thomas Mitchell assigned his interest in the lands to trustees upon trust for himself for life, and after his decease to trustees for a term of nine hundred and ninety-nine years, to secure a jointure for his intended wife, an annuity of £100 for the eldest son of the marriage, and a sum of £500 for younger children, and subject to the term upon other ultimate trusts. The marriage took effect, and there were issue several children, all still minors.

The plaintiff, having obtained an assignment of Hubert Kelly's judgment in November 1841, presented a petition in the following December in the Court of Chancery for a receiver under the Judgment Creditors' Acts, and in the month of February 1842 a receiver was accordingly appointed in the matter over the lands of which Thomas Mitchell was so seised, and which were subsequently let to him as a tenant in the matter.

A large arrear of head-rent having accrued due upon the lands, an ejectment was brought by the head landlord in Trinity Term 1844; and the amount of rent not having been paid, an habere issued and possession was taken of the lands by the head landlord on the 12th of November 1844.

The couzor of a judgment being seised in *quasi* fee became, by a deed prior to 1840, tenant for life of the lands, and created charges on them. The judgment creditor subsequently advanced sums to save the lands from eviction, and filed a bill for a sale during the couzor's life. The rent being again in arrear, he made further advances to pay it under an order in this cause. *Held* (MOORE, J., *dissentiente*), that as a salvager he was entitled to a sale of the *quasi* fee, though he could not have a sale as judgment creditor against the remainderman or creditors prior to 1840.

* JACKSON, J., MOORE, J., and BROOKE, M. C.

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Thomas Mitchell being wholly unable to redeem the lands or pay the sum due, which amounted to £275. 1s. 5d. rent and £37. 15s. 6d. costs, and the interest being in danger of eviction, he applied to the plaintiff to advance the sum which might be necessary for redeeming the lands, which the plaintiff declined to do without the authority of the Master in the petition matter. Accordingly the receiver having proceeded to pass his account, and a balance of £165. 5s. 1½d. only appearing to the credit of the matter, the Master, at the instance of Thomas Mitchell, directed the receiver to pay over that sum to the petitioner upon his undertaking to apply it towards redeeming the lands, and he consented at the instance of Thomas Mitchell to advance such further sum as might be necessary for that purpose, at interest at £6 per cent.; and the plaintiff did accordingly, upon the 28th of March 1845, pay the landlord the sum of £312. 16s. 11d. and thereby redeemed the lands from eviction.

The plaintiff having only received £12. 14s. 6d. on foot of his judgment, and the head-rent having again fallen into arrear, he obtained an order on the 3rd of December 1845 dismissing his petition without costs and discharging the receiver; and in September 1846 he filed the present bill praying that the sum so advanced by him for the redemption of the lands might be declared to be a lien on the interest of Thomas Mitchell therein, in priority and paramount to all charges and incumbrances, and also for an account of what was due on foot of the judgment debt, and in default of payment of his demands that the lands might be sold, and for a receiver in the meantime.

Thomas Mitchell and Frances Mitchell his wife by their answer admitted the facts as stated in the bill; but she insisted that she and her children were purchasers under the marriage settlement of the 19th of July 1830, and that the plaintiff was not entitled to any relief against them. In the year 1846, the head landlord again brought an ejectment against the lands for non-payment of rent, and the interest being on the eve of eviction, the plaintiff, on the 8th day of March 1847, obtained an order at the Rolls, upon notice to all the parties in the cause, that he should be at liberty to advance the sum of £261. 10s. 3d., the amount then due for rent and costs, for the

purpose of redeeming the lands, and that such advance should be the first charge on the *quasi* fee of the lands, and should bear interest at the rate of £5 per cent. per annum; and the plaintiff accordingly upon the 16th of March 1847 paid this sum to the head landlord and redeemed the lessee's interest in the lands.

On the 28th of June 1847 a decree was pronounced to take an account of what was due to the plaintiff on foot of the judgment, and also of what was due to him for principal, interest and costs on foot of the moneys paid by him for the redemption of the lands, and of incumbrances and their priorities.

The Master, by his report thereunder, made the 31st of December 1847, found that there was due to the plaintiff, on account of his two redemption advances, for principal, the sum of £442. 8s. 11½d., which he found was the first charge and incumbrance on the *quasi* fee and inheritance of the lands, and prior to all other charges and incumbrances affecting the same; and that the jointure of the defendant's mother Sarah Mitchell was the second charge, and the plaintiff's judgment debt the third charge.

The cause now came on for final hearing on report and merits.

Mr. Serjeant *Warren* and Mr. *Berkeley*, for the plaintiff.

They argued that he was entitled, as a salvage creditor by the request of the defendant Thomas Mitchell and acting under the orders of the Court, to have a sale of the lands.

Mr. *Gresson* and Mr. *Benjamin Stephens*, for the minor defendants.

The plaintiff is not entitled to a sale of the lands in any character. As a judgment creditor he cannot sell during the lifetime of his conuzor; and as a salvager he is not entitled, as against the minors claiming in remainder after their father's life estate, to sell the inheritance. As a salvager he can stand in no higher position than he originally did, and the utmost relief which he can have is a receiver to pay the salvage money out of the rents

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and profits: *Angell v. Bryan* (a); *Burrowes v. Molloy* (b); *Ramsbottom v. Wallis* (c). The advance was made merely to the tenant for life to pay his debt, namely, the head-rent, which he is bound to keep down; and it would be inequitable to permit a tenant for life to borrow money for his own debts and charge it on the inheritance. As to the costs; if the proposition be right that the plaintiff is entitled to a receiver, he should only be allowed such costs as he would get in a petition matter: *Tyrrell v. Hassard* (d); *Magee v. Hoey* (e); *Hill v. Kerr* (f).

Mr. *Berkeley*, in reply.

In his character of salvager the plaintiff is entitled to the relief he seeks by his bill—namely, to sell the *quasi* inheritance of the lands he has redeemed. He has an equitable lien on the land for his advances: *Kehoe v. Hales* (g); and in all cases where such lien exists the party has, as an incident to that lien, a right to sell the estate. A vendor has a specific lien for unpaid purchase-money, which he may enforce actively by sale. In *Hamilton v. Denny* (h) it was held that advances made by one joint tenant to secure a leasehold interest by the payment of the renewal fines, created a lien and charge on the *quasi* inheritance of the other moiety, though it was in settlement at the time. The lien is in the nature of a contract, and has been so held in the case of solicitors' liens: *Richards v. Platel* (i). The present case is stronger, for the money was advanced on an express contract with the defendant and the Court.

BROOKE, M. C.

June 24.
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This case has been heard for further directions upon the Master's report, to which no exceptions have been taken. The

(a) 2 Jo. & Lat. 763.

(b) 2 Jo. & Lat. 521; S. C. 8 Ir. Eq. Rep. 482.

(c) Coote on Mortgages, App. 704.

(d) Fl. & Kel. 625.

(e) M.S. Rolls, Nov. 1847; Reilly on Receivers, pp. 8, 9.

(f) 2 Ir. Eq. Rep. 410.

(g) 5 Ir. Eq. Rep. 597.

(h) 1 Ba. & Bea. 199.

(i) 1 Cr. & Ph. 79.

plaintiff is a judgment creditor of the defendant Thomas Mitchell. The date of the judgment is Easter Term 1825, and the only property upon which it attaches is a lease for lives renewable for ever, of which Mitchell was in 1825 the absolute owner, subject to his mother's jointure and the head rent. It appears by the pleadings, and is admitted at the Bar, that in 1830 the conuzor executed a marriage settlement, by which he conveyed his interest in the lease to trustees to secure a jointure for his intended wife, an annuity of £100 per annum for the first son of the marriage, and a sum of £500 for the younger children.

On the 11th of February 1842, the plaintiff obtained an absolute order for a receiver under the Sheriffs' Act, and a receiver was appointed; yet this proceeding was ineffectual to save the property from eviction for non-payment of rent, upon which the landlord, on the 12th of November 1844, executed his habere, and took possession. The receiver passed his account in the month of March following, when the balance in his hands being only £165, and £147 more being wanted to redeem the lease, the plaintiff, with the Master's sanction, advanced that sum, expressly stipulating for £6 per cent. interest on his loan. The receiver was consequently restored to the receipt of the rents; but in December 1845 the head-rent was again in arrear, and the plaintiff states in his bill that, having received only £12. 4s. 6d. from the receiver during the three and a-half years of his office and finding it hopeless to look for payment in that way, he obtained an order from the Master of the Rolls to dismiss his petition and discharge the receiver, the petitioner and respondent each to abide his own costs; and early in 1846 he filed his bill in this cause for an account of the sums due to him upon his judgment and his salvage advances, and for a sale. Towards the end of 1846 another ejectment was brought by the landlord; and on the 8th of March 1847, the plaintiff obtained an order at the Rolls, upon notice to all parties, that he should be at liberty to redeem the lands by paying £261. 10s. 3d. for rent and costs, and the Court declared that this sum should be a first charge upon the *quasi* fee, and bear interest at £5 per cent.

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Mr. and Mrs. Mitchell filed their joint answer on the 3rd of June 1846, by which they in substance admit the facts alleged by the plaintiff; but Mrs. Mitchell insists that she and her children being purchasers under the marriage settlement of 1830, the plaintiff is not entitled to any relief against them.

It does not appear however that any question was raised at the hearing as to the plaintiff's right to sell the lands, and neither Mrs. Mitchell's rights nor those of the defendants, her infant children, were mentioned before the Master nor appear in his report. But Counsel has argued before us for the minors and has raised the two questions which we have now to decide—first, whether the plaintiff has any right to a sale? secondly, whether he should have his costs of the suit in which (supposing the former objection valid) he cannot obtain any greater remedy than he might have had by the cheaper proceedings under the Sheriffs' Act: *Tyrrell v. Hassard* (a); *Hogan v. Baird* (b). If the view which I have taken of the former question be well founded, the latter does not arise in this case; for I think the plaintiff entitled to a remedy which he could not have obtained unless in a plenary suit; but were it otherwise, I cannot admit it to be a general rule that a plaintiff to whom the law has given two remedies is bound, at the peril of costs, to select the cheaper. The case of *Bernard v. Sadlier* (c) disproves the existence of any such rule. In this cause such a principle would operate very unjustly; for the plaintiff fairly stated by his bill that the only object of his suit was to sell the land, and the specific objection is not made until he has incurred all the expense of carrying his cause to a final hearing.

I now come to the main question, namely, whether the plaintiff is entitled to a decree for a sale? So far as he is a creditor by judgment he is plainly precluded from that remedy during the life of the conuzor, by the well established law of this Court; and he cannot avail himself of the provisions of the 3 & 4 Vic. c. 105, because the wife and children of Mr. Mitchell as purchasers under the deed of

(a) Fl. & Kel. 625.

(b) 4 Dru. & War. 296.

(c) 4 Ir. Eq. Rep. 61.

1830, have a right to rely upon the second of the four provisoes with which the 22nd section of that Act concludes, namely, that as regards purchasers, mortgagees or creditors who shall have become such before the time appointed for the commencement of the Act, such judgment shall not affect lands, tenements or hereditaments, otherwise than as the same would have been affected by such judgment if the Act had not passed. Is he then entitled to sell for payment of his two salvage advances, which are found by the report to take precedence of all the incumbrances, even of the jointure of 1796?

In support of the negative, the minors' Counsel relied upon the case of *Ramsbottom v. Wallis*, before Lord Langdale, cited in *Coote on Mortgages* (a), where a second mortgagee having covenanted not to foreclose his mortgage for ten years, purchased up the first mortgage, and then sought to foreclose the latter. His bill was dismissed, because the remedy by which he sought to enforce his prior claim was inconsistent with his covenant. I suppose no one can doubt the evident justice of this decision. The plaintiff was merely refused permission to violate indirectly his own covenant. The next case cited was *Burrowes v. Molloy* (b). The plaintiff there was mortgagee of a leasehold interest, whose mortgage deed contained a covenant that he would not foreclose the mortgage during the life of the mortgagor. Shortly after, the mortgaged premises were evicted for non-payment of rent and the mortgagee redeemed the lease by the payment of £390 for arrears of rent, and filed his bill for an account of what was due to him, and for a sale of the leasehold interest. The Chancellor gave him the account he sought for, and appointed a receiver for his benefit; but refused to permit the property to be sold until the death of the mortgagor, grounding his decision exclusively upon *Ramsbottom v. Wallis*, and the covenant into which the plaintiff had entered.

If the act of the creditor in redeeming the lease in this latter case was altogether voluntary, I admit that Sir Edward Sugden's decision

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(a) App. 704, 2nd ed.

(b) 2 Jo. & Lat. 521; 8 C. 8 Ir. Eq. Rep. 482.

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was a necessary consequence of Lord Langdale's. But I have always understood that the reason of the priority which Courts of Equity give to the salvage creditor is this, that the payment is in a manner compulsory and that, in the common danger, it is for the benefit of all to encourage an advance of money, without which the mortgagor himself and every one of his creditors must suffer a serious loss. It is considered beneficial for all parties to give the most ample remedies to him who has saved the common security, provided they are confined to that property which, but for his advance, would have been lost to every one concerned. It is enough, however, for my present purpose to repeat that the decision in *Burrowes v. Molloy* is expressly declared by the eminent Judge who pronounced it to rest entirely upon the principle of *Ramsbottom v. Wallis*—in other words, upon the effect of the plaintiff's covenant.

In the case before us the salvage creditor is bound by no covenant. There is no personal equity affecting him. But it is argued that, because he cannot by the rules of this Court sell the leasehold property for payment of his judgment so long as the conuzor lives, he is equally disqualified from doing so for the re-payment of his salvage advance.

In order to prove that this argument derives no assistance from *Ramsbottom v. Wallis*, it is only necessary to suppose a state of facts similar to those of that case. If a judgment creditor during his conuzor's life had purchased up a prior mortgage, would he be refused a foreclosure of that mortgage during the life of his conuzor? Most clearly not. The creditor in such a case would have no right to tack his judgment to his mortgage, so as to exclude an intermediate mortgagee: *Brace v. The Duchess of Marlborough* (a); but his right to foreclose his mortgage was never doubted. If then the principle of *Ramsbottom v. Wallis* does not affect this case, how can the case before Sir Edward Sugden touch it, seeing that the latter is based entirely on the former?

(a) 2 P. Wms. 492.

It was argued that the arrears accrued by the default of the tenant for life, and that it would be an injury to the remainderman to sell the estate in consequence of such default. But that argument was fully weighed in *Hill v. Browne* (a), a case very similar to this, except that the plaintiff was a mortgagee; and Sir Edward Sugden, after citing *Loftus v. Swift* (b), says:—"The equity" (that is, the equitable duty of the creditor to be active against the negligent tenant for life) "is not stronger than in the other case; it is simply that the mortgagee is negligent and lies by. The neglect is equal in both cases. If the estate is about to be lost, what is the mortgagee to do? Is he to allow the estate to be lost? I apprehend he is entitled to salvage. If he does not redeem, the estate is lost to all parties. The remainderman has no right to insist on the mortgagee performing a duty equally incumbent on all parties." I have read the report and final decree in *Hill v. Browne*. The decree was pronounced on the 27th of January 1846 by Sir Edward Sugden, and directed a sale of the whole leasehold interest to pay, in the first place, the several salvage advances in the inverse order of their dates. This, then, is a distinct authority, that even where the estate is in strict settlement, the creditor negligent and the tenant for life grossly in default, a *bona fide* advance by the former to save the lease shall entitle him to priority and to payment by means of a sale.

It was suggested in argument that the remedies of the salvage creditor could not be greater than those belonging to his original security. No authority is cited for this, and no reason is suggested. The remedies and privileges yielded to the creditor who saves the estate are founded on the principle that every just encouragement should be given to any interested party who, in the common emergency, will advance money for the good of all. Whether the creditor who is able and willing to pay the price of redemption be a mortgagee or the conuzee of a judgment does not in the slightest degree increase the danger or diminish the general benefit which is derived from his act. But if a judgment creditor should, on such an

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(a) 6 Ir. Eq. Rep. 403.

(b) 2 Sch. & Lef. 655.

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occasion, be deterred by this supposed technical rule from risking his money, a great injury would be inflicted on everybody concerned except the landlord, whose interests are certainly not to be considered in weighing this question. I have stated the proceedings in this case at some length, because I think they remarkably illustrate this portion of the argument. If the plaintiff's advisers had believed in the existence of such a rule as is now contended for, the loan of 1847 never would have been made, and the property would equally have been lost to the creditors and the minors.

I have said that no authority is cited to prove the existence of the alleged rule. On the other hand, I think that the case of *Kelly v. Staunton* (a) is an authority against it. There the mortgagee of a leasehold, who was also a salvage creditor, and to whom all interest on both his demands had been paid to the last gale day, applied for a receiver. It is the settled rule of Equity that, under such circumstances, he could not as mortgagee be entitled to a receiver; yet the Master of the Rolls appointed a receiver, because the mortgagee having once advanced his money to save the estate had a right to secure himself against the recurrence of a similar danger. This seems a very just decision, and is plainly an instance of a remedy granted to a salvage creditor, which he could not have obtained by virtue of his original demand.

I have not been able to find authority, English or Irish, upon this question. I have been obliged to consider it upon general principles. It seems to me that to refuse the remedy sought for would in many cases be injurious to all parties; to grant it does no injustice to any one. I therefore think the plaintiff entitled to a sale of a competent part of the lands for payment of his two salvage advances and his costs of this suit, and also to discharge the next incumbrance, namely, the arrears of the jointure. If there be any unsold surplus of land, or if the whole lease be sold and a balance of the purchase money should remain in Court in the shape of Government stock, the annual produce will be applicable to the jointure

(a) 1 Hog. 393.

first, and then to pay the plaintiff's judgment during the life of Mr. Mitchell.

MOORE, J.

In this case I have the misfortune to differ from my learned Brethren, and although, in differing from them, I think it is more than probable that I am myself in error, yet after anxious consideration of this question I have been unable to arrive at the same conclusion to which they have come. I shall occupy as short a time as possible in stating the view which I have taken of this case, and the grounds on which I rest it.

On the face of his bill the plaintiff comes before the Court in two capacities—one as a judgment creditor, and the other as a creditor of the estate on foot of salvage advances made by him for its preservation. Now, it is conceded that, under the circumstances of this case, he is not entitled in the first of these capacities to file a bill for a sale of the lands, the conuzor of this judgment being still alive; nor does he in that character seek a decree for a sale by his bill. But it is said then that, though the plaintiff is not entitled to file the present bill for a sale as a judgment creditor, he is yet entitled to maintain it on foot of his salvage advances. I willingly acknowledge that it is not possible in any case for a party to come before the Court under more favourable circumstances than the plaintiff in the present instance does, and that, if it would be right in any case to establish such a precedent for decreeing a sale, the present would be that case. I fully concur in a part of the argument of my Brother BROOKE, viz., that the fact of the lands being under settlement and of the arrears having accrued due during the lifetime of the tenant for life cannot have any operation; because, if a party advances money *bona fide* for the salvage of an estate, his right is paramount to every one; and I would have considerable difficulty in coming to the conclusion that he would be prevented by the settlement from selling, if on the other principles I thought he was entitled to do so. But it appears to me, that the right which he has as a salvage creditor he only possesses as incidental and accessory to his principal demand; and I cannot bring my mind to the con-

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clusion that he should have, for that which is accessorial or incidental, a greater right than he has for the principal demand.

My reason for thinking so is, that if a third party, not having any interest to preserve, were to come forward and advance money for the salvage of the estate, he would have no *locus standi* in this Court to file a bill to raise the amount of such salvage advances. The answer of a Court of Equity to such a person would be, "You had no business to interfere, you being a mere volunteer who chose to advance this money, and you must abide the consequences of the act." I think that this principle is sufficiently established by the case of *Angell v. Bryan (a)*. In that case, the devisee for life of a leasehold estate for lives having suffered an arrear of rent to become due, the landlord brought an ejectment, upon which a third person, at the request of the devisee, advanced money for the purpose of paying the rent, which was secured by a mortgage of those lands by the devisee; by that means then the interest in these lands was protected for the benefit of all parties, and the question arose, whether the salvager should stand in priority to the judgment creditors of the devisor; but it was decided that he could not stand in a better position than the devisee, at whose instance he advanced the money. Now, it appears to me to be clear on the authority of that case, that the equity of a salvager arises only where the money is advanced by a person who has an interest in the estate; and it is perfectly plain to me, that a man who has an interest to protect, as every judgment creditor has, makes the advance solely with a view to his own interest. I cannot give such a person credit for such generosity, as to think that he makes the advance from any other motive. I apprehend, then, that no person who has an incumbrance affecting the estate will make an advance for the salvage of that estate except to protect his own interest, and therefore, where a judgment creditor, who is cognizant of his own rights, advances money in the way of salvage, he must do so because he thinks that when the value of the estate is realised the fund will reach his demand; and I take it, that if he were a puisne creditor

(a) 2 Jo. & Lat. 763.

on an estate incumbered beyond its value, he would not do so. If he thinks that the property will reach him, that is to say, if he thinks it his interest to do so, he will advance the money for the salvage of the estate, and if not he will not do so.

It strikes me that a salvage claim is incidental and accessorial to the rights and interests of the person who advances the money for that purpose, and I think that in place of a protecting medium it would be the reverse if a person in the situation of a judgment creditor could sell on foot of an accessorial demand in a case where he could not sell for the payment of his principal demand. Suppose the property is a failing fund and consists of what could not be sold for the satisfaction of the judgment, and the judgment creditor makes salvage advances; he then files his bill to raise the amount of his judgment and also of his salvage advances; he cannot sell the property as a judgment creditor, he can only do so for his salvage advances; and the result would be that the estate would be sold for the amount of the salvage claim, with heavy costs, and nothing would remain after satisfying these demands.

Therefore, looking at the salvage claim as incidental and accessorial, I do not think it is necessary, with a view to encourage parties to become salvagers for the protection of estates, to hold that persons who advance money for the purpose of redeeming an estate should be entitled to sell as salvagers, when their principal claim would not give them the right of sale. But independent of principle, I think that this point has already been substantially decided in the case of *Burrowes v. Molloy* (a), between which case and the present I cannot draw any sound distinction. In that case W. L. Otway, whose assignee the defendant was, being possessed of several houses under a lease for sixty-one years, by deed of the 1st of June 1841 mortgaged them to the plaintiff to secure certain advances made by him; and by a contemporary deed, which recited that the mortgage deed was defective in not extending the time for redemption until after the decease of W. L. Otway, the plaintiff covenanted that the money then advanced should not be called in until after his decease.

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(a) 3 Ir. Eq. Rep. 482; S. C. 2 Jo. & Lat. 521.

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In the year 1843, W. L. Otway was discharged as an insolvent debtor, and a large arrear of head-rent having accrued due to the landlord of the mortgaged premises, proceedings were taken by him for their recovery. In that state of things an application was made to the plaintiff to advance the money necessary to save the mortgaged premises from eviction, and he did so. He was originally a mortgagee without a power of sale, because he could not, of course, in opposition to his covenant, seek a sale. He then became a salvage creditor, and having become so, he filed his bill and asked for a sale. He was clearly not entitled to a sale as mortgagee, for in that capacity he was restricted by the covenant in his mortgage deed; but then he insisted he was entitled to have a sale as a salvage creditor; and if he had that right in his character of salvager, what was there to preclude him from exercising the right of sale in that character, because he had not the right of sale as mortgagee? The Court decided that he was not entitled to sell as mortgagee; that was clear enough; but the Court also said he could not sell as a salvage creditor. The words of the Lord Chancellor (a) are:—"Then comes the question, whether on account of his salvage claims the plaintiff is entitled to file this bill. No authority has been cited in support of this claim, and I am of opinion that he could not file such a bill as a mere salvage creditor." Why not, if the right of sale is necessarily incidental to his claims as a salvage creditor? And, again, he says:—"For if claiming as a mortgagee he cannot, during the lifetime of the mortgagor, file a bill to foreclose, neither can he, by making advances out of his character as a mortgagee, entitle himself to maintain a suit which he could not maintain in his original character of mortgagee."

Now, stopping there for a moment, see whether there is not a perfect identity between that case and the present. If in that case the mortgagee could not file a bill for a sale as a salvager, by reason of his covenant, in this case the judgment creditor cannot do so during the lifetime of the conuzor, by reason of the existence of

(a) 2 Jo. & Lat. 525.

prior creditors. If the mortgagee, being a salvage creditor, could not sell in that case, I cannot see how the judgment creditor can do so in this. And then after referring to the case of *Ramsbottom v. Wallis* (a), the Lord Chancellor remarks:—"Whatever might be the priority of his claim, he could not enforce that claim by reason of his covenant." There was no necessary connection there between the covenant contained in the mortgage deed and the plaintiff's claims as a salvage creditor, except that he possessed these as incidental to his claim as mortgagee; and if he could not enforce the latter, neither could he enforce a claim which he only possessed as accessory to it. Here the plaintiff is a judgment creditor, and his only equity as a salvager arises out of his claim as judgment creditor. It is admitted that he could not, under the circumstances of the present case, file a bill for a sale in the latter character; and I cannot see any distinction in principle between this case and that of *Burrowes v. Molloy*.

It therefore does appear to me that the plaintiff is not entitled to that part of the relief sought. As to the other question, viz., that of costs; it follows that the plaintiff would be entitled as of course to his costs, if I am not right; but even if I am right, I think the plaintiff should have his costs, because, although in that view he would not be entitled to affect this estate by a sale, he yet would be entitled to do so by means of a receiver.

I regret to be obliged to differ with the other Members of the Court, and I unfeignedly think that, in all probability, I am myself in error.

JACKSON, J.

The Commissioners having differed in this case, and the principle being one of importance, though the amount involved is not large, it was deemed right by the Court that a settled rule should be established on the subject after due consideration, and accordingly we postponed delivering our judgment in the hope of arriving at an unanimous conclusion; this having unfortunately not been

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attained, and my Brethren being of different opinions, I have to regret that I am obliged to differ from one or other of the Members of the Court. I shall proceed therefore shortly to give my reasons for the view which I have taken of this case.

The decree to account in this cause declared that the plaintiff is entitled to his principal and interest on foot of the judgment of which he is the assignee, and that the same is well charged upon the lands in the pleadings mentioned; and directed a reference to the Master to take an account of what was due to the plaintiff on foot of the judgment, as also of what was due to him for principal, interest and costs, on foot of the monies paid by him for the redemption of the lessee's interest in the lands, and also to take an account of incumbrances.

Under this decree the Master made his report, and finds the proceedings in the ejectment, and the salvage advances made by the plaintiff, which he finds to be the first charge on the lands mentioned in the pleadings; the jointure of Sarah Mitchell, of which Andrew Mitchell is the assignee, he finds to be the second charge; then the claims on foot of the plaintiff's judgment the third charge; and then several other judgments in their order as subsequent charges. The facts of the case are these. The plaintiff is a judgment creditor and advanced the sum of money which he now seeks to have raised by a sale in order to save the interest in the lands from eviction; and the question is, can the plaintiff as a salvage creditor have, under the circumstances of this case, a sale of the lands for the repayment of his salvage advances?

It has been contended with much force, and considerable stress has been laid upon the argument, that the plaintiff's salvage debt should rank with his principal debt, and that he should have no higher right or remedy in respect of his incidental claim than he could have for his principal demand. I am not satisfied that this is a correct view of the case. Though in one sense I admit that his salvage claim is incidental and accessorial, yet I do not think it follows, that he may not have rights in respect thereof which he has not in his original character. I think the case of *Hill v. Browne* shows, that in such a case salvage claims would be enti-

tled to be distinguished from the principal demand. Here the report ranks the plaintiff's salvage claims as a first charge on the inheritance, and that report is unexcepted to.

I must say, that in the course of the able argument addressed to us, no authority was referred to which, in my judgment, supports the position contended for here on the part of the defendant, namely, that the plaintiff, in respect of a claim which is accessory, can be entitled to nothing more than he would be entitled to on foot of his principal demand; unless the case of *Burrowes v. Molloy* establishes that, which I do not think it does.

In the absence of direct authority, I concur with my Brother BROOKE that we ought to do what is reasonable; and I think that in the case of *Kelly v. Staunton (a)*, referred to by him, the Court has recognised the principle, that salvage advances made by a creditor of the estate are entitled to be ranked higher than his original claim.

No doubt, in *Burrowes v. Molloy* Sir Edward Sugden did not grant a sale; but he there granted a receiver, showing what was the inclination of his mind; he felt himself restrained by the plaintiff's own covenant; and it was perfectly plain that there the mortgagee ought not to be permitted to do indirectly what he had bound himself not to do directly. Here the plaintiff is not bound by any covenant or contract, either equitable or otherwise.

I think, therefore, that it is equitable and just that the plaintiff, as a salvage creditor, should have a sale; and that it is highly beneficial that persons who are entitled to charges affecting an estate should be protected and encouraged in preserving the estate. There is no injury done to the remainderman thereby. If the plaintiff had not interfered the property would have been evicted, and the estate lost to the remainderman, the creditors and all parties; and it is admitted that if there be a case which, more than another, calls for the intervention of a Court of Equity, this is that case. In the first place, the plaintiff is an executor; his original claim is not more than one-third of his salvage advances;

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and in what he did he acted under the authority of the Court. I may add, that no objection was made on this ground at the hearing of the cause, nor was a demurrer taken to the bill.

On the whole, I think the plaintiff is entitled to have the amount of his demand paid by a sale, together with his costs. At the same time, considering the importance and probable recurrence of this question, it would be agreeable to us if it were brought under the consideration of some other tribunal.

Reg. Lib. 99, fol. 373, 1848.

LOCKE v. EVANS.*

(Equity Exchequer.)

1823.
Nov. 15.

A sub tenant having redeemed his landlord's interest by advances for head rent, filed a bill for the sale of that interest, and subsequently made further advances for the same purpose. *Held*, that these several advances were the first charge on the mesne landlord's interest in priority to incumbrances prior in date, and that the salvagor was entitled to a sale for payment.

JOHN EVANS being possessed of the lands of Ballycallaghan for a term of years under a demise from Lord George Quin, with a *toties quoties* covenant for renewal at a rent of £97. 9s. 6d. per annum, subsequently demised a portion of these lands containing about twenty-two acres to William Thomas Monsell, at a rent of £94. 0s. 6d. per annum; Monsell afterwards assigned his interest to the plaintiff, the Rev. John Locke; and on the 17th of January 1815, John Evans made a lease of the twenty-two acres to Locke direct.

A large arrear of head-rent having become due to Lord George Quin, he brought an ejectment and executed his habere. On the 24th of June 1817, Locke paid the head landlord the sum of

* The Reporters have been referred by Mr. I. S. O'CALLAGHAN to the above case, decided in the Court of Exchequer, in which a decree was made for a sale for salvage advances by a sub-tenant who had no independent incumbrance on the interest sold; and it is here inserted as bearing on the question debated in the preceding case of *Fetherstone v. Mitchell*.

£308. 4s. 10½d. for redemption of the premises, and filed his bill on the 8th of July 1817, praying that the sum so advanced by him might be paid by a sale of the interest of John Evans, and for a receiver in the meantime.

To this bill Mary Storey, the representative of R. Storey, to whom, in 1814, John Evans had mortgaged his interest in the lands for £1000, and Maurice Colles, a custodiam creditor of John Evans, whose custodiam was founded on a judgment of 1812, and who had got into possession as custodee before the eviction by Lord George Quin, were made parties.

On the 28th of June 1820, a decree was pronounced in the cause to take an account of all sums due to the plaintiff on foot of his advances for redemption of the lands, and an account of the mortgage of 1814 and all charges prior thereto, and of the sums due to the custodiam creditor.

The head-rent being again in arrear, an ejectment was brought, and Mr. Locke advanced, pending the cause, two sums of £114. 13s. 8d. and £230. 1s. 6d. to prevent eviction; and upon the 7th of June 1822, filed his supplemental bill in the cause, stating the sums already advanced by him, and that there was a further sum of £146. 1s. 1½d. of head-rent due, which he might be obliged to pay. A decree to account was pronounced on the 18th of February 1823, directing the Remembrancer, in addition to the accounts already directed, to take an account of the interest due to the plaintiff on foot of his first advances, and also of all advances made by him subsequent to the filing of the original bill, together with such other sums as he might, pending the cause, advance for the like purposes.

On the 14th of June 1823 the Remembrancer, by his report, found that the plaintiff had, on the 24th of June 1817, paid for head-rent and ejectment costs the sum of £308. 4s. 10½d., out of which was to be deducted £99, the sum at that time due by him to Evans on foot of the rent payable by the plaintiff; and that after the filing of the original bill the plaintiff had advanced and paid to Lord George Quin further sums amounting to £344. 15s. 2d., and that there was due to the plaintiff on foot of these advances (after

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deducting the sums payable by him for his own rent to Evans), with interest to the date of the report, the sum of £240. 7s. 10½d.; and the Remembrancer also reported certain sums due for principal and interest to the sisters of John Evans on foot of charges on these lands, created in their favour by the will of his father, under which will and subject to these charges John Evans had derived his title to these lands as held under Lord G. Quin; but he found that he could not state what was due to the mortgagee or custodiam creditor, no evidence thereof being laid before him, and that there were no other prior charges.

Decree.

On the 15th of November 1823, a final decree in the supplemental cause was pronounced, declaring the sums already paid by the plaintiff for head-rent and costs to be a charge upon the lands prior to the several other charges mentioned in the report; and directing these sums with interest to be paid to him, and also such further sum or sums of money as it should appear he should thereafter pay in redemption of said lands and premises; and directing payment also of the sums found due to the sisters of John Evans; and in default of payment forthwith of these sums, then that the lands of Ballycallaghan, or a competent part thereof, should be set up and sold.

Exchequer Hearing Book, vol. 32, fol. 245, 1823.

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BRADY v. FITZGERALD.

(In the Rolls.)

Feb. 24.

THE bill stated that Sir William Ingoldsby being seised in fee of the lands of Castlekeale and other lands in the county of Clare, by indenture, bearing date the 24th of July 1824, conveyed them to Samuel Monsell and his heirs for ever at a rent of £369. 17s. 6d., late currency; that Samuel Monsell entered into the lands and paid the said reserved rent to Sir W. Ingoldsby during his life, and that since the death of the said Samuel Monsell the rent had been always paid by the several persons deriving title to the premises under him to the several persons deriving title to the fee-farm rent under Sir W. Ingoldsby.

Since the statute of *Quia Emptores* there cannot be a grant in fee-farm. A rent reserved on a grant in fee, if accompanied by a power of distress, is a rent-charge, and as such a bill will lie for recovery of it.

Statement.

The bill then stated that the estate in the fee-farm rent had come to and was vested in the plaintiff, and that the estate of Samuel Monsell in the lands had come to and was legally vested in the defendants Charles Fitzgerald, Sir William Fitzgerald and John Westropp, and as to a small part of said lands in John Singleton; that some of the said persons paid to the plaintiff as assignee of the interest of Sir W. Ingoldsby the said reserved rent in certain proportions agreed among themselves for several years; that the lands held by John Westropp, in respect of which he had paid a proportion, were called by the name of Ballymockhen, and that the same, although not mentioned in the deed of the 24th of July 1725, were part of the lands included therein, but that the plaintiff being ignorant of the boundaries of the said lands could not with certainty state how the fact was; but that for the two last years the proportion of the rent which theretofore had been paid by John Westropp had been allowed to run in arrear and had not been paid.

The bill then stated that a sum of £203. 2s. 3d. was due on foot of the fee-farm rent, and various applications to the several defend-

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ants and their agents, and that the defendant Sir W. Fitzgerald claimed to hold his part of the lands free from the rent-charge, and alleged that Charles Fitzgerald should pay the proportion theretofore paid by him, and relied on some deed between one James Fitzgerald, grandfather of the defendants Charles and Edward Fitzgerald, and father of Sir William, with the contents whereof the plaintiff was unacquainted.

The bill further stated that by reason of the antiquity of the said grant, and the difficulty of tracing down the title to the same and to the premises out of which the same issued, the plaintiff was advised that he could not proceed safely by distress or at law, or in any other manner than by bill in equity, and that there were outstanding legal terms which would or might be set up to defeat the plaintiff's title at law, whereby the plaintiff was obliged to have recourse to this Court.

The bill prayed that the fee-farm rent might be decreed well charged on the said lands, an account of the arrears due, and a receiver, and that he might be directed to pay the arrears due and the accruing gales.

The defendant Charles Fitzgerald, by his answer, submitted that the plaintiff had not shown that he was without remedy at law, and that the general allegation introduced into the bill for that purpose was wholly insufficient and unfounded in fact; that rents such as that to which the said plaintiff was entitled, were by statute law remediable by distress, and that the plaintiff would have no difficulty in raising the rent off the lands.

Argument. Mr. Serjeant Warren moved for a receiver. He cited *Stevell v. Murphy* (a); *Manly v. Hawkins* (b); *Duke of Bridgewater v. Edwards* (c); *Holden v. Chambury* (d), and distinguished *Cremen v. Hughes* (e) as a case where the relation of landlord and tenant existed.

(a) 2 Ir. Eq. Rep. 448.

(b) 1 Dr. & W. 363.

(c) 4 Br. P. C. 139.

(d) 3 P. Wms. 257.

(e) 8 Ir. Eq. Rep. 156.

Mr. *Brewster* and Mr. *Francis Fitzgerald*, for the defendant Charles Fitzgerald, resisted the motion.

They contended that the plaintiff had stated no peculiar ground of equity to entitle him to a receiver ; that there was a remedy at law for the recovery of the rent ; that the case did not fall within the authority of *Stevelly v. Murphy* (a), because there were peculiar grounds for the interference of a Court of Equity in that case ; nor within the authority of *Manly v. Hawkins* (b), for the rent in that case was granted, here it is reserved, and therefore a writ of annuity would not lie for it : *Co. Lit.* 144 a ; *Com. Dig. Annuity, A, 3*. That the ground of the decision in *Cremen v. Hawkes* was not the existence of the relation of landlord and tenant, but the existence of something analogous to it ; and a similar ground existed in this case ; for at Common Law and before the Statute of *Quia Emptores*, such a reservation would have created the relation of landlord and tenant. That the difficulty of avowing at Common Law had been held in *Cremen v. Hawkes* not to be a sufficient reason for the appointment of a receiver. They also cited *Roberts v. Hughes* (c).

Mr. *O'Brien* and Mr. *Hughes*, for Sir W. Fitzgerald.

Mr. *Christian*, in reply, argued that this was not a case of landlord and tenant ; for a reversion or *quasi* reversion was necessary to such a relation ; that before the Statute of *Quia Emptores* there would have been a feudal tenure, but no reversion between these parties ; the relation of lord and vassal, but not that of landlord and tenant. In *Cremen v. Hawkes*, though there was no reversion, and therefore in strictness of law no relation of landlord and tenant, yet the intention of the parties was that there should, and that was the ground of Sir Edward Sugden's decision. That the bill in this case alleged a confusion of boundaries, which was held in *Fay v. Fay* (d) to be sufficient ground for the interference

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(a) 2 Ir. Eq. Rep. 448.

(b) 1 Dr. & W. 363.

(c) Beatty, 417.

(d) 2 Jo. 350.

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of a Court of Equity. The distinction between a rent-charge and a fee-farm rent was merely nominal, and therefore this case fell within the authority of *Manly v. Hawkins*. The plaintiff had no remedy at law, for he could not maintain an action of covenant: *Milnes v. Branch* (a); *Executors of Kennedy v. Stewart* (b); *Randall v. Rigby* (c); nor an action of debt: *Webb v. Russell* (d); *Kelly v. Clubbe* (e); nor ejectment, for none but the grantor or his heirs could at Common Law take advantage of the condition of re-entry: *Co. Lit.* 215 a; and if the plaintiff had distrained, the difficulty of avowing would have been almost insuperable.

Judgment.

THE MASTER OF THE ROLLS.

The question raised on this motion is important, viz., whether a bill can be sustained for the appointment of a receiver by a person entitled to a fee-farm rent, there being no sufficient impediment to its being recovered at law? It appears from the case which has been recently published in *Beatty's Repts.*, *Roberts v. Hughes* (f), that in Sir Anthony Hart's time a distinction existed in suits for the recovery of rent-charge between the Courts of Chancery and Exchequer. The Court of Exchequer in Ireland exercised jurisdiction where a bill was filed to raise the arrears of a rent-charge, although there was no impediment to proceeding at law. The Court of Exchequer in England also exercised such jurisdiction: *Cupit v. Jackson* (g).

Previously to the case of *Manly v. Hawkins* (h) the Irish Court of Chancery would not entertain a bill to recover the arrears of a rent-charge, unless there were some particular circumstances entitling the party to equitable relief, such as confusion of boundaries, an outstanding legal estate, &c.: *Roberts v. Hughes*. From my recollection of the practice, I believe it would be found (if the bills filed in the Court of Chancery previously to *Manly v. Hawkins* were examined), that there was uniformly a statement in the bill of

(a) 5 M. & S. 411.

(b) 4 Law Rec. N. S. 160; S. C. 7 Ir. Law Rep. 421, *note*.

(c) 4 M. & W. 130.

(d) 3 Term Rep. 393.

(e) 6 B. Moo. 335.

(f) Beat. 417.

(g) 13 Pri. 721.

(h) 1 Dru. & Wal. 363.

some impediment to the recovery of the arrears of the rent-charge at law. It was, however, decided by Lord Plunket in that case, following the decisions of the Courts of Exchequer in England and Ireland, that a bill would lie to recover the arrears of a rent-charge although there was no legal impediment to recovering the same at law. That case was recognised by Sir E. Sugden, and it is a binding authority in this Court, although I thought at the time, having been Counsel in the case, and think still, that if there had been an appeal to the House of Lords it is very doubtful whether the decision would have been sustained. The question then arises, whether there is any sound distinction between the case of a rent-charge and a fee-farm rent? In the case of *Stevelly v. Murphy* (a) Sir Michael O'Loghlen, in giving judgment, observed, "It is said that this is a case of a fee-farm rent, a case between landlord and tenant, and therefore different from the case of a mere annuity or rent-charge; but it seems to me that if the distinction exists at all it is merely nominal, for I do not think that a grant in fee (without retaining any reversion in the grantor), subject to a rent, could properly be said to have established the relation of landlord and tenant between the parties, nor that, so far as the present question is concerned, any real difference exists between such rent and the ordinary rent-charge." Sir M. O'Loghlen added—"I am therefore of opinion that the case of *Manly v. Hawkins* must be considered as settling the present question; and therefore that, as well in the case of fee-farm rents as in the case of rent-charges, this Court has jurisdiction concurrent with that of the Law Courts to give relief such as is here sought."

There were, no doubt, other grounds in that case on which Sir Michael O'Loghlen founded his decision, but I think the opinion which he expressed can be sustained if the nature of a fee-farm rent be considered. Before the Statute of *Quia Emptores*, if a man made a feoffment in fee reserving a rent, the rent in point of law was a rent-service, and the feoffor might have distrained for it as of common right (c). Mr. *Hargrave*, a very high authority on a ques-

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(a) 2 Ir. Eq. Rep. 448, p. 456.

(b) Lit. sec. 216.

(c) Lit. sec. 216.

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tion of conveyancing, in a note to *Co. Lit.* (a), says :—" After the Statute of *Quia Emptores*, granting in fee-farm, except by the King, became impracticable ; because the grantor parting with the fee is by operation of that statute without any reversion, and without a reversion there cannot be a rent-service, as Littleton himself writes in section 216. Yet I have seen a modern grant in fee of a large estate in Ireland, reserving a perpetual rent of great value ; but such rent considered as a fee-farm rent, I thought clearly void. However, as in the case I allude to, the conveyance contained a power for the grantor and his heirs and assigns to distrain for the rent when in arrear, and also a power to enter and receive the profits until all arrears should be paid, the rent might be good as a rent-charge ; and so on being consulted I held it to be." Therefore a fee-farm rent, although it still retains its old legal name, is not, properly speaking, a fee-farm rent at all, for it has ceased to be a rent-service and is void as a mere reservation, and the only right to recover the rent is by the operation and effect of the clause of distress and re-entry, the rent being in law a rent-charge. Sir M. O'Loghlen's opinion is thus fully sustained by the opinion of Mr. *Hargrave* ; and if a fee-farm rent is only recoverable by virtue of the clause of distress and re-entry, and is in law a rent-charge, there is an end of the question, as *Manly v. Hawkins* decides that a bill will lie to recover the arrears of a rent-charge.

I do not think this doctrine inconsistent with the decision in *Cremen v. Hawkes* (b). In that case the grantor, being possessed for a term of years, executed an instrument which although in form a lease was an assignment of the entire interest, reserving a rent. The Statute of *Quia Emptores* has no application to such a case ; and although the case of *Pluck v. Digges* has decided that a general avowry cannot be sustained under the Landlord and Tenant Acts without a reversion, yet there are cases in England (one in the Court of Common Pleas (c) in that country) in which it has been considered that a *quasi* relation of landlord and tenant exists

(a) *Co. Lit.* 143, b, n. 235.

(b) 8 Ir. Eq. Rep. 153, a. ; S. C. on appeal, 8 Ir. Eq. Rep. 503.

(c) *Baker v. Gosling*, 1 Bing. N. C. 19.

in such a case. The rent, although not strictly speaking a rent-service, is in the nature of a rent-service; eviction would probably be held to be an answer at law to an action for the rent, and I apprehend that in an action for the rent, the deed need not be pleaded as a grant of a rent-charge. The bill in *Cremen v. Hawkes* was in effect a bill by a landlord to recover rent from his tenant. In the case of a rent reserved on a grant in fee, Mr. *Hargrave* considered that such a rent, as a fee-farm rent, was clearly void under the Statute of *Quia Emptores*. In this country, at the time when the Courts considered that an ejectment for non-payment of rent would lie although the grantor had no reversion, it was also held that an ejectment for non-payment of rent would not lie for a fee-farm rent in consequence of the Statute of *Quia Emptores*. And although it is now held that an ejectment for non-payment of rent cannot in any case be sustained unless the grantor has a reversion, yet such decision is founded on the Landlord and Tenant Acts, and does not affect the authority of the English cases in which it has been considered that a *quasi* relation of landlord and tenant may subsist without a reversion. I therefore am of opinion that the case of *Cremen v. Hawkes* is not inconsistent with the opinion of Sir M. O'Loughlen or Mr. *Hargrave*; and concurring in opinion with those two eminent persons, that a rent reserved upon a grant in fee is a rent-charge, I shall make an order of reference for the appointment of a receiver.

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—
Judgment.

PENNEFATHER v. STEPHENS.

THE bill in this cause prayed an account of the sum due on foot of two annuities or rent-charges, charged on certain lands by a deed of the 18th of February 1808, and for a receiver.

May 25

By that deed, Bolton William and Thomas Pennefather, according to their respective estates, joined in conveying the lands to Francis Oldis, and his heirs for ever, he Francis Oldis paying an annuity or rent-charge of £270 to Bolton Pennefather for

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his life (which rent, at the filing of the bill, had determined), and also paying to Thomas Pennefather and his heirs for ever a rent-charge of £960, and to William Pennefather and his heirs a rent-charge of £40, for the recovery of which the bill was filed. The bill alleged that there was confusion of boundaries and that there would be difficulty in distraining, on account of the disturbances in the district where the lands were situated. The bill also alleged that in consequence of the defendant's embarrassments it would be useless to proceed against him in a Court of Law; but these allegations were denied by the answer.

Argument.

Mr. Serjeant *Warren*, with whom was Mr. *Hughes*, moved for a receiver.

Mr. *Christian* and Mr. *John Francis Walker*, for the defendant.
 The same authorities were cited as in *Brady v. Fitzgerald*.

Judgment.

The MASTER OF THE ROLLS.

In the case of *Brady v. Fitzgerald*, which was before me last Term, I referred to the case of *Stevell v. Murphy* and to a note by Mr. *Hargrave to Co. Lit.* 143 b—[His Lordship read the note.]—That note is of high authority, having been written by a most eminent conveyancer, and it shows that at this day there can be no fee-farm rent. If a power of entry and distress be reserved, the rent is a rent-charge. This therefore is a rent-charge and falls within the authority of *Manly v. Hawkins*. The case of *Roberts v. Hughes* (a), before Sir Anthony Hart, was decided before *Manly v. Hawkins*. *Cremen v. Hawkes* (b) was decided on the ground of the quasi relation of landlord and tenant; and according to *Baker v. Gosling* (c), the rent was in the nature of a rent-service and not a rent-charge.

Manly v. Hawkins has been approved of by Sir Edward Sugden, and is not distinguishable from this present case. I shall therefore make the order of reference for the appointment of a receiver.

(a) Beat. 417.

(b) 8 Ir. Eq. Rep. 503.

(c) 1 Bing. N. C. 19.

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THOMAS O'BRIEN, *Petitioner;*
EDWARD SCOTT, *Respondent.*

THOMAS O'BRIEN, *Petitioner;*
JAMES DOYLE and DANIEL SCOTT, . *Respondents.*

June 23
July 3, 19.

In this case a petition was presented under the Sheriffs' Act for a receiver. The facts of the case were these:—

In Trinity Term 1845 the respondents in the second matter, James Doyle and Daniel Scott, obtained a judgment against Edward Scott the respondent in the first matter.

In Trinity Term 1846 the petitioner obtained a judgment against the said Edward Scott. James Doyle and Daniel Scott issued an elegit on their judgment. The inquisition was returned and filed on the 20th of July 1846; and shortly afterwards they entered into possession under the elegit and inquisition.

The petitioner Thomas O'Brien registered the judgment so obtained by him in Trinity Term 1846, on the 25th of September 1846.

In October 1846 Thomas O'Brien presented a petition under the Sheriffs' Act, for a receiver over the lands and premises extended under the elegit, stating in such petition that the said Edward Scott, the conuzor of the judgment, was in possession.

An order of reference to appoint a receiver was made in November 1846, upon notice to E. Scott only. A notice was served on the petitioner Thomas O'Brien in February 1847 by James Doyle and Daniel Scott, cautioning him against proceeding under the order for the appointment of the receiver, and stating that they had entered into possession under the elegit and inquisition.

On the 12th of February 1847 the judgment obtained by James Doyle and Daniel Scott was registered under the 7 & 8 Vic. c. 90.

A second petition under the Sheriffs' Act was presented by

A obtained a judgment in T. T. 1845. B obtained a judgment in T. T. 1846. A sued out an elegit, the inquisition on which was returned and filed on the 20th of July 1846, and went into possession of the lands extended. B's judgment was registered in September 1846; A's in February 1847. Held, that A's judgment had priority.

Semble.—The registration of a judgment under the 7 & 8 Vic. c. 90, gives no priority as between judgment creditors, except for the protection of heirs and personal representatives in the administration of assets.

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Thomas O'Brien against James Doyle and Daniel Scott, submitting that as the judgment obtained by T. O'Brien in Trinity Term 1846 was registered under the Act on the 25th of September 1846, and the judgment obtained by James Doyle and Daniel Scott in Trinity Term 1845 was not registered until February 1847, the petitioner was entitled to priority, and the petitioner prayed to to have the benefit of the order made for the appointment of a receiver in the first matter.

Mr. Patrick Blake, for the petitioner.

Argument.

The 2nd* section of the 7 & 8 Vic. c. 90, enacts that no judgment shall affect "lands, tenements or hereditaments as to purchasers, mortgagees or creditors, unless or until a memorandum

* NOTE.—The 7 & 8 Vic. c. 90, s. 2, enacts that "no judgment of the said Superior Courts respectively, or rule for such judgment, already docketed under the said first recited Act (3 G. 2, c. 7, *Ir.*), and which has not already been, or shall not, on or before the said first day of November 1844 be, redocketed or entered after revival under the said Act of the ninth year of the reign of his late Majesty King George the Fourth (9 G. 4, c. 35), shall after the first day of November 1845; nor shall any judgment of the said Superior Courts respectively, which on the said first day of November 1844 shall not be docketed under the said first recited Act, or which shall be obtained after that day, affect any lands, tenements or hereditaments as to purchasers, mortgagees or creditors, unless and until a memorandum or minute thereof containing the names and the usual or last known place of abode, and the title, trade or profession of the plaintiff and defendant, or person whose estate is intended to be affected thereby, and the Court in which such judgment or rule shall have been obtained, and the date of such judgment or rule, and the amount of the debt, damages, costs or moneys thereby recovered or ordered to be paid, shall be left with the officer to be appointed under this Act, who shall forthwith enter the same particulars in a book in alphabetical order by the name of the defendant or person whose estate is intended to be affected by the said judgment or rule; or unless and until the same shall be duly revived according to the course and practice of the said Superior Courts respectively, and a like memorandum or minute as aforesaid, stating also the revival thereof, shall be left with the officer to be appointed under this Act, who shall forthwith enter the same particulars in a book of revivals, to be kept by him in alphabetical order, by the name of the defendant or person whose estate is intended to be affected by such judgment or rule; and such officer shall be entitled for every such entry to the sum of five shillings."

Sec. 9.—"Provided always, and be it enacted, that nothing in the said recited Act of her present Majesty (3 & 4 Vic. c. 105) or in this Act contained, shall extend to revive or restore any judgment which shall be extinguished or barred, nor shall the same extend to affect or prejudice any judgment as between the parties thereto, or their representatives, or those deriving as volunteers under them, save so far as is herein expressly provided."

or minute thereof" shall be registered with the proper officer. The effect of the Act is to render a judgment altogether nugatory against creditors. It may be contended that when registered the judgment has relation back to its original entry; but such a construction would be open to great difficulty, and might occasion great injustice. If right, it must be applied as to purchasers and mortgagees, who might thus be affected by a judgment of the existence of which they had no means of informing themselves; for since the Act there can be no search for unregistered judgments: *In re Bagot (a)*.

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Argument.

Mr. O'Callaghan, for the respondent.

The question is, whether the registration of the petitioner's judgment prior to ours but subsequently to the completion of the elegit proceedings can defeat them? The 2nd section of the Act is capable of two constructions, either that the judgment does not affect lands as to purchasers, mortgagees or creditors, until registered, but then has relation back to the date of its entry, or that it affects lands only from the date of its registration. If the former be the true construction, our judgment has priority; if the latter, we are entitled to the protection of the Act by reason of the estate which we have acquired by the elegit. It is plain from the 2nd, explained by the 9th section, that the Legislature intended to protect all persons except the defendant or conuzor and his representatives or those deriving as volunteers under them. There is strong ground for contending that an elegit creditor is a purchaser, and therefore expressly within the terms of the 2nd section. But whether he be strictly a purchaser or not, the respondent had an estate in the lands by virtue of the elegit when the petitioner's judgment was registered, and if that judgment is to have effect only from its registration, it can only affect them subject to that estate.

Mr. Blake, in reply.

Before registration each judgment was inoperative as to the other. The judgment first registered gained priority over the other, and

(a) 8 Ir. Law. Rep. 295.

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 ———
Argument.

cannot be affected by the elegit, for an elegit creditor is not a purchaser, and there is no provision in the Act that suing out an elegit shall be equivalent to registration.

July 3.

The question was again argued on this day, when it was urged on behalf of the respondent that from the recital in the preamble it was plain that the Act was intended for the protection of purchasers, and therefore that the enactment in the 2nd section should receive the same construction as the Docketing Act 3 G. 2, c. 7, viz., that registration gave no priority to judgments except in the case of assets.

On the other hand it was contended that the use of the word "creditors" in the 2nd section showed that the Legislature intended that registration should give priority to a judgment in every case; and that if the 2nd section was to be restricted by the preamble the protection of the Act would be withdrawn from mortgagees as well as from creditors, which would be contrary to the express terms and manifest intention of the Act.

Ferguson on Judgments, pp. 51, 53, *Doe d. M'Ilwaine v. Magill* (a), *Underhill v. Devereux* (b), *Robinson v. Harrington* (c), were cited.

July 19.
Judgment.

The MASTER OF THE ROLLS (after stating the facts of the case).

The respondents James Doyle and Daniel Scott insist that they are entitled to priority, having extended the lands under the elegit prior to the registration of the petitioner's judgment. I am of opinion that the respondents James Doyle and Daniel Scott are entitled to priority. The judgment of James Doyle and Daniel Scott was recovered in Trinity Term 1845; the judgment of the petitioner T. O'Brien in Trinity Term 1846.

When the elegit issued and the inquisition was returned and filed, neither of the judgments had been registered under the statute

(a) 1 H. & B. 396, n.

(b) 2 Saund. 68.

(c) Powel on Mortgages, 515 a, 6th Ed.

of the 7 & 8 Vic. c. 90. Upon the return of the inquisition filed on the 20th of July 1846, James Doyle and Daniel Scott became entitled under the Statute of Westminster to an estate in the lands, their title having relation to the date of their judgment in Trinity Term 1845; and such estate in the lands was of course unaffected by the judgment obtained by T. O'Brien in Trinity Term 1846.

The question which then arises is, whether the estate so acquired under the *elegit* and inquisition could be defeated by the registration, on the 25th of September 1846, of the judgment of Trinity Term 1846? I find nothing in the language of the 7 & 8 Vic. to justify me in holding that the registration of a judgment can defeat an estate in the lands, which estate is prior in fact to the registration of such judgment, and prior by relation to the judgment itself so registered. A judgment creditor who has extended lands under an *elegit* is not a purchaser for valuable consideration so as to hold discharged of a prior equitable mortgage of which he had no notice: *Whitworth v. Gaugain* (a); but in this case the judgment obtained by the petitioner O'Brien was subsequent to the judgment obtained by James Doyle and Daniel Scott; and O'Brien's judgment not having been registered until after the inquisition had been returned and filed, such registration could not, in my opinion, defeat the estate acquired under the *elegit* and inquisition.

The statute 7 & 8 Vic. c. 90, s. 2, provides that no judgment obtained after the 1st of November 1844, shall "affect any lands, &c., as to purchasers, mortgagees or creditors, unless and until a memorandum or minute thereof (containing the particulars stated in the Act) shall be left with the officer to be appointed under the Act, who shall forthwith enter same," &c.

James Doyle and Daniel Scott not being purchasers for valuable consideration, by reason of the *elegit* and inquisition, according to *Whitworth v. Gaugain*, cannot rely on the non-registration of O'Brien's judgment at the time they extended the lands; but on the other hand, O'Brien cannot object to the non-registration of the judgment obtained by James Doyle and Daniel Scott until

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(a) 3 Hare, 426; S. C. affirmed on appeal, 1 Phillips, 728.

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after the registration of his judgment, Doyle and Scott not being merely judgment creditors, but having obtained an estate in the lands prior by relation to O'Brien's judgment, which estate could not, as it appears to me, be defeated by the subsequent registration of O'Brien's judgment. There is nothing in the Act to show that, by registration of a judgment a prior estate created by statute and arising by matter of record is to be defeated; I am therefore of opinion that I ought not to make any order on the petition. The question would have been different if the judgment of Trinity Term 1846 had been registered under the said Act of the 7 & 8 Vic. c. 90, prior to the award of the *elegit* and filing of the inquisition.

If it were admitted that, as between two judgment creditors, a *puisne* judgment would gain priority over a prior judgment, by such *puisne* judgment being first registered under the 7 & 8 Vic., it might be strongly contended that the judgment creditor prior in point of time, if he had lost his priority by reason of the registration of the *puisne* judgment, could not alter the priorities by issuing an *elegit*; and that the *elegit* would only have relation to the judgment on which it was issued, according to its priority under the said Act; but the question then arises, whether under the said Act of the 7 & 8 Vic. c. 90, priority is gained by the *puisne* judgment creditor registering his judgment before the registration of the prior judgment? At Common Law, the judgment when entered had relation to the first day of the Term preceding the entry of the judgment. This of course was productive of much injustice to purchasers; and by the Statute of Frauds it was enacted that judgments as against *bona fide* purchasers for value should in consideration of law be judgments only from the time they were signed by the officer. Under that Act, however, it was necessary to refer to the judgment roll, which was productive of trouble and inconvenience; and although, as early as the reign of Henry the Eighth, dockets or indexes were kept by one of the Courts in England for convenience, *Tidd's Practice*, 9th ed. 939, it was not until the reign of William and Mary that docketing was by law rendered necessary as against purchasers and mortgagees; and by the Eng-

lish Act (4 & 5 *W. & M.*), it was enacted that no judgment not docketed and entered in the books kept for that purpose according to the Act should affect any lands, &c., as to purchasers or mortgagees, or have any preference against heirs, executors or administrators, in the administration of their ancestors', testators' or intestates' effects: 2 *Saunders' Rep.*, p. 9, note 5, 5th ed.

Upon the latter provision of that Act it has been held that an outstanding judgment against a testator or intestate, not docketed according to the Act of *W. & M.*, cannot be pleaded by an executor or administrator to an action on a simple contract: *Steele v. Rooke* (a); and Mr. Justice Heath in giving judgment said,—“The object of the Act was not only to protect executors and administrators but also creditors.”

In the case of *Robinson v. Harrington*, reported in 1 *Powell on Mortgages*, 5th ed. 515, it was decided upon exceptions to the Master's report of priorities, that as between two judgment creditors the prior judgment although not docketed had priority over a subsequent judgment which had been regularly docketed under the Act. The facts of that case were these:—In 1739 the defendant gave a bond for £100 to Sarah Green, and in Trinity Term 1744 the obligee brought an action against the defendant upon the bond, who pleaded the general issue; and the issue roll upon which the cause was entered was regularly carried in the Term upon which the issue was joined; but the case was never tried, the parties being under an agreement to compromise. However the plaintiff entered continuances upon the roll regularly by *non misit breve* until Michaelmas Term 1745, when the defendant withdrew his plea and confessed judgment. The clerk of the judgments then entered up final judgment upon the issue roll, but never took any docket of the same to the Clerk of the Essoigns, which according to the statute 4 & 5 *W. & M.* c. 7, he ought to have done. When therefore the judgment creditor came before the Master, though the judgment appeared to be signed on the 29th of May 1745, he postponed it to the other judgment of 1784, because Mrs. Green's

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(a) 1 B. & P. 310.

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judgment was not docketed with the Clerk of the Essoigns. When the exceptions to the Master's report came on before the Court, it was contended on behalf of Mr. Stratford as the representative of Mrs. Green, that the Master ought to have placed her judgment in priority according to the signing; and that the statute 4 & 5 *W. & M.* made no alteration whatever in priority as between judgment creditor and judgment creditor; for the Act only said "that no judgment not docketed or entered upon the book pursuant to the statute should affect any lands as to purchasers, or mortgagees, or have any preference against executors or administrators in the administration of their ancestors', testators' or intestates' estates." This therefore was not a case within the Act, for the great object of the statute of *W. & M.*, as appeared clearly by the preamble, was to enable purchasers or mortgagees to find out such judgments as affected the lands they were about to purchase or advance money upon, and likewise to give the heirs, executors and administrators an opportunity of inquiring what judgments were entered up against their ancestors, testators or intestates, so that they might apply their assets and effects in a due course of administration; and at Common Law judgments did not affect lands and tenements, but by the Statute of Westminster 2, the writ of *elegit* was given, whereby a plaintiff may extend a moiety of the lands and tenements of which the defendant was seised at the time of the judgment recovered; that, however, as all judgments at Common Law were by a fiction supposed to be judgments of the first day of the Term, there was no distinction respecting this matter until the time of Charles the Second, when it was enacted by the Statute of Frauds and Perjuries "That any Judge or officer of any of his Majesty's Courts at Westminster that shall sign any judgment, shall, at the signing of the same, without fee for doing the same, set down the day of the month and year of his so doing upon the paper, book, docket or record which he shall sign, which day of the month and year shall be also entered upon the margin of the roll of the record where the said judgment shall be entered;" and it was further enacted, "That such judgment as against purchasers *bona fide* for a valuable consideration, of lands, tenements and hereditaments, to be charged

thereby shall, in consideration of law, be judgments only from such time as they shall be so signed ; and shall not relate to the first day of the Term whereof they are entered, or the day of the return of the original or filing of the bill ; any law, usage, &c., to the contrary notwithstanding." But though this Act of Parliament settled all difficulty respecting the fiction of law whereby the judgment was supposed to be always of the first day of the Term, by compelling the party to set down the particular period when the judgment was signed, and declaring that as against purchasers *bona fide* for a valuable consideration the lands, tenements and hereditaments to be charged thereby shall be charged only from such time as the judgment was signed ; yet, inasmuch as it did not compel the plaintiff to carry in the judgment roll, purchasers and others were rendered altogether incapable of discovering what judgments were recovered : and therefore the statute of 4 & 5 *W. & M.* c. 20, to remedy that inconvenience, directed that all judgments should be docketed and entered with the particular officer of such Court ; and that unless they were so docketed they should not affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors or administrators in the administration of their ancestors', testators' or intestates' estates. But that did not take away the right which a judgment creditor had by the Statute of Westminster to extend the lands of his debtor. It only laid him under particular restrictions in particular cases, which Mr. Stratford did not come within the meaning of. It was further contended and admitted that if Mr. Stratford had sued out an *elegit* and brought an *ejectment* to recover a moiety of the lands of his debtor, he might have laid his demise on the day on which the judgment was recovered, which plainly proved that the lands were affected from the time of the judgment recovered, and not from the time of the docketing. For if there had been two judgment creditors of the same day, one docketed and the other not docketed, and the undocketed creditor had got possession by virtue of an *elegit*, the docketed judgment creditor would not oust or eject him from the possession until his debt had been fully satisfied out of the rents and profits ; which was agreed to by the Court, and Mr. Stratford ordered to stand in priority.

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The statement in that case, that the day of the demise might be laid on the day the judgment is recovered, is not accurate. The day of the demise in an ejectment, by an *elegit* creditor, must be laid after the inquisition, the judgment creditor not having a right to the possession until then; but the title of the judgment creditor has relation to the judgment, to avoid intermediate acts. However, the case of *Robinson v. Harrington* is not affected by that error.

So also in the case of *Doe v. Magill* (a), it was held that the 3 *G.* 2, c. 7, *Ir.* (which corresponded with the 4 & 5 *W. & M., Eng.*) was passed only for the protection of purchasers and the heirs and personal representatives of testators', and intestates' estates, but did not operate as between judgment creditors.—[The MASTER OF THE ROLLS read the case.]

These cases, if well decided, establish that the Act of *W. & M.*, and the corresponding Irish Act of the 3 *G.* 2, c. 7, do not apply as between two judgment creditors, unless for the protection of heirs and personal representatives; and that a prior judgment, not docketed, had priority over a *puisne* judgment, although regularly docketed under the said Acts respectively.

The question however then arises, whether the law on that point has been altered by the 7 & 8 *Vic.* c. 90?

That statute, after reciting the Act of the 3 *G.* 2, c. 7, and also after reciting Moore's Act, and after reciting that it was "expedient to make further provision for the protection of purchasers against judgments and against Crown debts and *lis pendens*, and to establish one office in Dublin in which alone purchasers and heirs, executors or administrators, may find all judgments which bind lands in the hands of a purchaser, or give a preference against heirs, executors, or administrators in the administration of their ancestors', testators' or intestates' effects," enacts by the 2nd section, that no judgment already docketed under the 3 *G.* 2, and which has not already been, or shall not on or before the 1st day of November 1844 be, redocketed or entered after revival under Moore's Act, shall, after the 1st of November 1845, nor shall any judgment which on the 1st of November 1844 shall not be redocketed under the Act of *G.* 2,

(a) 1 *Hud. & B.* 396.

or which shall be obtained after that day, "affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or *creditors*, unless or until a memorandum or minute thereof (containing certain particulars in the section specified) shall be left with the officer, &c., who shall forthwith enter same," &c.

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If the preamble of the Act is to be the guide to its construction, the object of the Act was to protect purchasers (which would include mortgagees), and also heirs, executors and administrators in the administration of their ancestors', testators', or intestates' effects, and to establish one office where all judgments, Crown debts and *lis pendens* might be found; and from the preamble it would not appear to have been intended to give rights as between creditors further than the Act of *G. 2* had done for the protection of heirs, executors and administrators.

On the other hand, it may be contended that the introduction of the word "*creditors*" in the enacting part of the 7 & 8 *Vic.* shows that it was intended that the Act should go further than the Act of the 3 *G. 2*, and should apply in all cases as between two judgment creditors.

This question is one of some difficulty; and it is not necessary that I should offer any opinion upon it, as the case may be decided on the grounds I have already adverted to. But as the authorities which bear upon the question were not referred to in the course of the argument, I have thought it right to refer to some of the most important; as it would be proper, should this question again arise, that it should be fully argued. My opinion at present is, that it was not intended by the 7 & 8 *Vic.* to give rights as between creditors, further than the Act of *G. 2* had done for the protection of heirs, executors and administrators.

I shall dismiss this petition; but I may observe that if the petitioner desires to have the question decided at law, he may issue an *elegit* and extend the lands, and bring an *ejectment* against the respondents in the second matter.

Let the petition stand dismissed with costs (*a*).

(a) See *Abbott v. Stratton*, 9 Ir. Eq. Rep. 233.

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(*Chancery.*)

In a suit instituted to set aside certain securities entered into by the plaintiff to trustees for the separate use of one of the defendants, as the plaintiff's wife, the plaintiff alleged that she had been previously married to A, and examined A, who proved the fact of the marriage. *Held*, that A was not a necessary party to the suit.

Securities obtained from the plaintiff as a compromise of doubtful rights, but under the threat and apprehension of arrest, and without adequate consideration or advice, set aside.

THE bill in this cause was filed for the purpose of setting aside a deed of covenant, a bond, and three promissory notes, which had been obtained from the plaintiff, John Bindon Scott, under circumstances which are fully detailed in the Lord Chancellor's judgment, and for an injunction to restrain the defendants from suing on them.

The plaintiff married the defendant Mary Jane Scott, in the year 1833. It was alleged by the bill, that Mary J. Scott had been previously married to a person of the name of Anthony Galway. Galway was examined in the cause, and proved that a marriage ceremony had been celebrated between him and the defendant M. J. Scott; but there was some doubt of the validity of this marriage, and a prosecution for bigamy instituted by the plaintiff against the defendant M. J. Scott failed. She was acquitted, but on what grounds it was not clearly proved. The securities sought to be impeached in this suit were obtained from the plaintiff in October 1845, and shortly afterwards the bill was filed against M. J. Scott, and against John Lecomte and Alexander Buchanan, to whom the securities had been given in trust for her. Galway was not made a party. The defences relied on by Mrs. Scott in her answer and at the Bar were, that the securities were given as a fair compromise of doubtful rights, and that Galway was a necessary party to the suit, the more particularly as the plaintiff had made the marriage with Galway a part of his case, and proved it.

The *Attorney-General* (Moore), Serjeant *Warren*, Mr. *Brewster* and Mr. *Brereton*, for the plaintiff.

Mr. *Butt*, Mr. *Christian* and Mr. *O'Flynn*, for the defendant M. J. Scott.

The following authorities were cited:—*Evans v. Llewellyn* (a); *Lord Chesterfield v. Jansen* (b); *Long v. Long* (c); *Lord Westmeath v. Lady Westmeath* (d); *Durant v. Durant* (e); *Carpenter v. Elliott* (f); *Hobbs v. Hull* (g); *Worrall v. Jacob* (h); *Nunn v. Ladbrooke* (i); 2 *Story's Eq. Juris.* pp. 808, *et seq.*; *Mitf.* p. 180, 4th ed.; *Wybourn v. Blount* (k); *Atwood v. ———* (l); *Naylor v. Winch* (m); *Cory v. Cory* (n); *Stapilton v. Stapilton* (o); *Dunnage v. White* (p); *Stockley v. Stockley* (q); *Bowyer v. Covert* (r); *Fermor's case* (s); *Roche v. O'Brien* (t).

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THE LORD CHANCELLOR.

This is a bill filed by John Bindon Scott against Mrs. Mary Jane Scott, John Lecomte and Alexander Buchanan, and the prayer of the bill is, that two bonds executed by the plaintiff to the defendants John Lecomte and Alexander Buchanan, for the payment of the several sums of £6000 and £15,000 and the interest thereon respectively, and also that several promissory notes given by the plaintiff, and all other securities entered into and executed by the plaintiff in the manner and under the circumstances stated in the bill, may be declared null and void, and that the same may be respectively delivered up to be cancelled; and that in the meantime the defendants John Lecomte and Alexander Buchanan may be restrained from assigning over or otherwise disposing of the said bonds, and that the defendants John Lecomte and Mary Jane Scott may be restrained from negotiating or putting into circulation the said promissory notes, and from commencing or prosecuting any action at law against the plaintiff upon the said several securities.

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- (a) 1 Cox, 339.
- (c) 5 Ir. Eq. Rep. 38.
- (e) 2 Hag. Sup. 53.
- (g) 1 Cox, 445.
- (i) 8 T. R. 521.
- (l) 1 Russ. 353.
- (n) 1 Ves. 19.
- (p) 1 Swanst. 137.
- (r) 1 Vern. 95.

- (b) 2 Ves. 154.
- (d) 2 Hag. Sup. 1.
- (f) 2 Ves. jun. 493.
- (h) 3 Mer. 256.
- (k) 1 Dick. 155.
- (m) 1 Sim. & St. 565.
- (o) 1 Atk. 5.
- (q) 1 Ves. & B. 23.
- (s) 3 Rep. 77.

- (t) 1 B. & B. 354.

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The plaintiff complains that those several securities were obtained from him improvidently, by fraud and surprise, under menaces and the apprehension of arrest, occasioned by the defendants Mrs. Scott and Lecomte, and a person of the name of Blewitt, who appears to have been employed by them, and is an advocate and attorney practising in the Isle of Man. The defendant Mrs. Scott insists that the securities are valid; and the ground on which she insists that they are so is, that they constitute a reasonable settlement of differences between her and Mr. Scott, the plaintiff, being a compromise of doubtful rights, and carrying out substantially the terms of an arrangement previously agreed on between them.

The position of these parties is extremely singular. It appears that Mrs. Scott married the plaintiff Mr. Scott when he had recently come of age, and that shortly after the marriage circumstances came to the knowledge of Mr. Scott and of his family and friends, which led them to suppose that Mrs. Scott had been previously married to Anthony Galway. Much evidence has been given by the plaintiff to prove the fact of this marriage, and by Mrs. Scott to negative the circumstances relied on in support of it. But I do not think it necessary to decide on this record how the parties really stand in that respect. Whether there be or be not a valid marriage proved between Mrs. Scott and Galway, I cannot undertake to determine. There is evidence both ways. It is positively sworn to by Galway, and supported by corroborating circumstances of a strong nature, partly proved by other persons and partly by the admissions of Mrs. Scott herself when she was charged with it. On the other hand, evidence was gone into by Mrs. Scott, tending to show either a great mistake, or something worse, on the part of the witnesses for the plaintiff in respect to the circumstances stated, as to her living in Dublin with Galway. I felt much difficulty as regards the position of Galway, in consequence of the line of proof gone into by the plaintiff, establishing, if I concurred in the evidence, the marriage of the defendant to Galway. It tended to set up a title in the latter to the securities, and consequently to show that I could not give relief against them in a suit to which he was not a party.

It was attempted to answer this by referring to a passage in Lord Redesdale's book (*a*), in which it is stated that a demurrer will not lie to a bill for want of parties by reason of the absence of a personal representative, if it be alleged that the right to the representation is in contest in the Ecclesiastical Court; and it was argued that this applied to the present case, because it is uncertain on the evidence who is the husband of this lady. I was not satisfied at the time with this observation as an answer to the difficulty, nor am I yet satisfied that it is an answer to it. I have no evidence before me in the cause from which I can draw the inference, that if the plaintiff's evidence respecting Galway is true, that person would not be the lawful husband of Mrs. Scott; the only question to be decided in this respect on the evidence would be, whether she was the wife of Scott or of Galway; and the plaintiff proving (if he has proved) the latter as a fact, leaves no question undecided so as to keep open the possible claim of a third party or to make it doubtful whether such a claim in fact exists. I cannot say that the passage in *Mitford*, which I have cited, and which only refers to a question on demurrer, and which in itself is perfectly correct, applies to a case at the hearing of a cause where the evidence of the party who has the framing of the suit is directed to the proof of a fact—and proves it as far as it goes—showing that there is no uncertainty as to the condition of the absent party.

It was further suggested by the plaintiff that the difficulty might be obviated by confining the relief to a present injunction against enforcing these instruments, and by having them brought into Court to be subject to any title Galway might establish; but that does not meet the difficulty, because it must more or less abstract from the right of the absent party, and prevent him from making these securities charges on the plaintiff's estate.

But the true answer to the objection is, I think, to be found in the nature of the securities and the agreement with which they are connected. They are not isolated instruments given by a mere stranger to the defendants in an independent character; but they

(a) *Mitf.* on Pl. 180. 4th ed.

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are all part of the same transaction—all connected with the agreement, and dependent on the possession or assumption by this lady of the character of wife of the plaintiff. The trustees of them having the legal estate are here. They are trustees for this lady, not in any separate or individual position, but for her as Mary Jane Scott, insisting on being the wife of the plaintiff. They are for her benefit in that name; she reserving by that agreement (though it does not give her the title of wife) the power to enforce her rights as such in certain events: and I feel very clear that I can protect the trustees so situated, as regards these securities, against the claim of any person whose assertion of interest must begin with a negation of that character. They are trustees for this lady as the alleged wife of Mr. Scott, and not for a person who can only make his claim against them through her as trustees for himself, by proving her to have been guilty of the crime of bigamy, and to have obtained these securities by means of that crime. I feel, therefore, relieved from any difficulty on that question of form, and I proceed to deal with the facts of the case, so far as they appear to be material to the decision of the suit.

Soon after the marriage of the plaintiff and defendant, circumstances appear to have led to a strong belief, at all events, in the minds of the family and of Mr. Scott himself, that the lady had been previously married to Galway. She left Mr. Scott's residence, and in 1833 proceedings were taken to have her tried for the crime of bigamy, Galway being alive. She was, however, acquitted on that charge, and for the purposes of this suit it is unnecessary for me to form an opinion as to the grounds of that acquittal. There is a controversy on the evidence upon the question whether the acquittal proceeded from a doubt of the marriage with Galway, or from evidence given that such marriage with Galway was illegal, a former husband of the lady, named Carter, being then alive. That such evidence was given respecting Carter is not disputed, and that the acquittal may have proceeded on that ground is not improbable. But no evidence on the subject of that previous marriage, if it ever took place, was given in this cause. Therefore I can make no further allusion to the trial respecting it, save in this respect, that

such evidence was unquestionably given and may have led to the acquittal. That acquittal could not have been considered as conclusively showing that the marriage with Galway did not take place. It left the question still undetermined, and it has not been determined by any decree of the Ecclesiastical Court. It was undetermined when the securities sought to be impeached in this cause were given, and is undetermined to this hour.

From that period to the year 1837, when the plaintiff's father died, and he himself succeeded to the family estate, nothing appears to have been done on either side in respect of the marriage. But in that year the defendant Mrs. Scott instituted a suit in the Consistorial Court of the diocese of Killaloe against the plaintiff for restitution of conjugal rights. That suit appears to have been removed to the Prerogative Court in Dublin. In July 1840, an order was made by the late Dr. Radcliffe for payment by the plaintiff to the defendant of the sum of £120 for *interim* alimony. That suit proceeded, and in the month of July 1842 judgment was given by Dr. Radcliffe, declaring the marriage of the plaintiff with the defendant proved, and awarding that he should take her back as his wife. But that judgment was never formally made up; the delay having been occasioned by a suggestion of Dr. Radcliffe, that it should not be signed until the costs and arrears of alimony were paid, inasmuch as by the practice of the Court that demand could not be enforced after a decree signed in a suit of that nature.

About that time it appears that the plaintiff became embarrassed, and a bill was filed to enforce the payment of his debts. In that suit a receiver was appointed and is still in possession, and he has proved that the estate is heavily incumbered, and that the plaintiff has only £600 a-year out of it for his support.

The cause proceeded to a hearing, and a decree was pronounced on the 2nd of June 1845. The defendant filed a charge under that decree claiming £210 as due for an arrear of alimony. It appears that in the month of September there had been paid by the receiver £200, leaving £10 due to her on account of the charge. The alimony was payable in April and October, and therefore, as the account would stand on these *data*, in October 1845 only £70 would

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be due to her on this demand. I mention these particulars, because some stress was laid on them as showing conclusively that at a subsequent stage of the transaction, about which this suit is conversant, Mrs. Scott was guilty of false swearing as to the amount due to her in October 1845 being actually £120. I have not been able to discover how, in point of fact, the whole account stood; but looking to the charge and the affidavit verifying it, which was sworn in June, I find allusion is made to another arrear, and therefore I cannot give to this part of the case the weight which at first it appeared to possess; and indeed it does not seem to be very material whether, in swearing to the amount due in October she calculated it at £70 or £120. Even at the latter sum she would not, I think, have much to complain of as regards the punctual payments of this allowance.

Nothing further appears to have been done in the Ecclesiastical suit. The plaintiff, Mr. Scott, in May 1843, left Ireland and went to reside in the Isle of Man, where he lived and cohabited with another female, by whom he is stated to have had several children, and whom he represented as his wife to persons in that island; and he was so living there in October 1845. It is unquestionable that about that time, that is, shortly after the judgment of Dr. Radcliffe in the suit for restoration of conjugal rights, a negotiation was commenced and proceeded to a certain extent between these parties or their friends, for a compromise of the controversies between them. Upon this subject the plaintiff has given some evidence, the defendant has given some more; but no final settlement took place. On the part of the plaintiff it is insisted that it was a condition of this arrangement that the defendant should furnish the plaintiff with means of dissolving the marriage, and evidence is given in the cause to that effect. A draft deed appears to have been prepared, but on the established rules of evidence I could not permit secondary evidence to be given of its contents. Therefore the evidence of the compromise must rest on what was detailed by the witnesses and two documents, a letter from the plaintiff Mr. Scott, and another from Daniel O'Grady, the only witness who has deposed to this proposition for a compromise. He is the only witness whose evidence

is read on this part of the case by the plaintiff. Part of his deposition is inadmissible; but he states in it that it was part of the proposition made by Mrs. Scott that she should furnish means to annul the marriage. On the part of the defendant, Mr. Mostyn the proctor was examined, and he has given evidence as to the terms of this compromise, and a letter of the plaintiff has also been given in evidence. But from the whole of this evidence I cannot deduce any thing certain as to the ultimate terms of this compromise. That it was intended to secure an annuity of £200 or £300 to this lady is pretty clear, and there is reason to believe that it was proposed to increase that annuity on the death of the elder Mrs. Scott, who had a charge on the estate: a sum of money was also to be paid at once; Mr. Mostyn speaks of it as a considerable sum: O'Grady says that it amounted to £2000 or £4000; but he connects it with that most important part of the negotiation about which Mr. Mostyn is silent, namely, that she should afford the means of annulling the marriage, which, for the sake of all parties, I will suppose to have been by furnishing evidence of the previous marriage with Galway or with Carter; and if I were to speculate on the supposed nature of the arrangement, having regard to what was then known or believed as to this lady's previous history, I can very readily suppose that such a term may have been anxiously sought to be included in the agreement on the part of Mr. Scott, with whom it must, on the supposition that she could supply such evidence, have been an object of great importance to procure a release from the connection which he had formed with her. The compromise, however, whatever it was, did not come to a conclusion. Mr. Scott's then solicitor, Mr. Trousdale, died about this time or shortly afterwards, and his affairs were placed in the hands of Mr. Jackson, his present solicitor in this cause. In this state matters remained until the latter end of October 1845, the period of the transactions now sought to be impeached.

On Saturday the 18th of October, the defendant Mrs. Scott arrived in the Isle of Man, accompanied by the defendant John Lecomte, with whom it appears she became acquainted at Calais in the month of November 1844. This defendant has been examined

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in this cause, and his previous history and condition in life have been much scrutinised. I am not called on to pronounce any opinion on this matter, or on his pursuits; whatever they were, he appears to have been a person making his livelihood and fortune by industrious occupations. All I think it necessary to advert to in regard to him as bearing on the merits of this case is, that he is a stranger to the plaintiff and to every person in the Isle of Man; and the utmost that can be stated as to his property is, that it amounts to about £200. From the proceedings of these parties it is apparent that the object of their visit to the Isle of Man was to obtain securities from Mr. Scott, and to put in action Mrs. Scott's demand for alimony, in order to coerce him to give those securities and to come into the defendant's terms; and Mrs. Scott brought with her from Ireland an affidavit of debt ready sworn.

On Monday the 20th of October the parties waited on Mr. John C. Blewitt, who is an advocate of the Courts of the Isle of Man, combining, as is the practice in that island, the profession of Counsel and solicitor or attorney. To this gentleman Mrs. Scott and Mr. Lecomte were strangers, and they did not bring to him any letter of introduction. Mr. Blewitt, from his other engagements, was not able to enter on the business until Thursday the 23rd. On that day Mrs. Scott and Lecomte called on him, and he received their instructions and directions. It is sworn by Mr. Blewitt, in his cross-examination, that Lecomte was introduced to him by Mrs. Scott as her brother-in-law. There is some contradiction between him and Lecomte on that point. The defendant Buchanan is in fact her brother-in-law, and there may have been some mistake on the part of Blewitt. It appears however that he was instructed to describe Lecomte as of the city of Dublin, which could scarcely with truth be considered a proper description of him.

Under these instructions and directions Mr. Blewitt proceeded to have a new affidavit prepared according to the form used in the island. This document was not read in evidence in this cause; it was objected to as not having been put in issue; but it appears to have been sworn to by Mrs. Scott, and a process called an action of arrest was instituted on it, and a warrant taken out for the arrest of

Mr. Scott. Mr. Blewitt swears that he believed that Mr. Scott was about to leave the island, and believed this to be the case on the representation of Mrs. Scott. On the same occasion, by the direction of Mrs. Scott, and before he had any communication with the plaintiff, Mr. Blewitt prepared three bonds each for £6000, which appears to have been at that time the measure of the sum which Mrs. Scott was determined to obtain at all events. These bonds were so prepared as to be payable at various times, one in quarterly and another in half yearly payments, and one on a fixed day to be inserted when it should be decided on. The arrangements having been made, the warrant to arrest Mr. Scott was issued and was placed in the hands of a bailiff named Richard Jones, and on the evening of the 23rd of October, when it was already dark, Mr. Blewitt, the defendant Lecomte and Richard Jones proceeded to the house of Mr. Scott. The instructions given to Jones were, to remain outside in view of the house. He was told by Blewitt that unless the demand was complied with he was to arrest Mr. Scott, and that he should arrest him if he came out without them. Jones being thus placed and instructed, Mr. Blewitt and Lecomte went into the house, where they remained about an hour, and in that period, these two persons, previously entire strangers to Mr. Scott, obtained from him the execution of one of the £6000 bonds, which had been brought there ready prepared as I have stated. That being done, the parties left the house, and Jones was told that he was not to execute the writ, the business having been satisfactorily arranged. For the particulars of this singular transaction and interview with Mr. Scott, the plaintiff is compelled to appeal to the testimony of the parties whose mission was thus far successful, and whose interest it is to sustain its validity, in point of character at least. In judging of that evidence, therefore, I may safely conclude that all that can be stated in favour of the transaction has been fully put forward; and that in stating or admitting matters of a different import they have not at all events stated them more strongly against themselves than the facts would warrant.

I think it is impossible to separate these proceedings from the transactions of the subsequent days. They form in truth the basis

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of the whole. The position in which Mr. Scott was placed by what then took place continued to the last, and affected more or less all the later acts and conduct of the parties. The interview appears to have begun by a statement made by Lecomte. Mr. Blewitt, in his answer to the 28th interrogatory, says:—"The said John Lecomte did make to the plaintiff a long statement relative to the treatment the said Mary Jane Scott had met from the solicitor of the plaintiff in this cause in Ireland. The substance of said statement was, the irregular payment of the alimony to the said Mary Jane Scott, and the great inconvenience and annoyance which she had suffered in consequence thereof, and complaints of the non-performance of the agreement made with Mr. Mostyn her proctor in Ireland, and, in fact, such statement contained a recital of the entire case and circumstances of the said Mary Jane Scott, as detailed to me in consequence of her ill-treatment in Ireland. The said plaintiff did on said occasion express his disapprobation of the alleged treatment of said defendant and the alleged ill-conduct of said parties in Ireland, and seemed to feel warmly on said subject." Similar evidence was given by him in answer to the 6th interrogatory. Lecomte and Blewitt were examined at great length on the part of the plaintiff. Their evidence is important as to this transaction. They state that they informed Mr. Scott that they were authorised to propose an arrangement of the matters between him and Mrs. Scott, and that he voluntarily and deliberately, and without compulsion, menace or threat, executed the bond for £6000, and that during the whole interview no allusion was made to the arrest which was meditated by the parties, or to the warrant which they had obtained against him. There are some statements, particularly in the cross-examination of Mr. Blewitt, which are very material in considering the real character of the transaction. They are contained in Mr. Blewitt's answers to the cross-interrogatories read on the part of the plaintiff.

To the 16th cross-interrogatory, he says—"Under the instructions and by the authority of the said Mary Jane Scott, I prepared the bond or bonds produced by me for execution to said John Bindon Scott on the first interview I had with him. In my opinion it is not right or proper, as a general practice or custom, for a profes-

sional man, without any instructions from the party intended to be bound or made liable by a bond or deed, to prepare same and require his execution thereof without any approval or advice of or from his own professional adviser; but the said plaintiff did not in this case require any such in the island." To the 17th cross-interrogatory—"I recollect that on my said first interview with the said John Bindon Scott I produced the form of prepared bonds, and after the said John Bindon Scott had agreed to execute one of said bonds, I said to the said John Bindon Scott something to the following effect:—'Let this or one of these be signed to-night and nothing unpleasant shall occur, and to-morrow you can call at my office and we will settle the affair; but until this is signed my instructions are such that I cannot make any terms;' but I cannot now particularly recollect said words." To the 18th cross-interrogatory—"The said John Bindon Scott did, on the evening referred to in my answer to the last preceding interrogatory, ask for time to write to his solicitor in Ireland. I did not reply to him that I did not wish to press him without advice to sign the bonds prepared by me, and that he should have full time to consult his solicitor thereon. The only reply I made was that Mrs. Scott had been waiting long and was very anxious to have the matter brought to a close; and nothing further was said on that subject."

In answer to the 20th cross-interrogatory he says—"It is the truth and fact that the said John Bindon Scott did before I left him on the evening in question sign a bond for the penal sum of £12,000, conditioned for the payment of £6000, which was made payable in two years by two yearly payments of £3000 each. If the said John Bindon Scott had not signed the said bond or had not come to some other satisfactory arrangement, I will not swear that I would not have had him arrested as in my preceding depositions mentioned, and it was in consequence of his having signed said bond and his readiness to come to a final arrangement with said defendant, Mary Jane Scott, that the said John Bindon Scott was not arrested by the said Richard Jones."

In answer to the 21st cross-interrogatory he says—"I did not offer the said John Bindon Scott time to communicate with his

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advisers in Ireland before I obtained his name to said bond, and the fact is, that the same was signed without any such communication; and if the said John Bindon Scott had refused to sign same without writing to his adviser in Ireland or without making some other satisfactory arrangement, I would have had him arrested on that evening or the following day."

To the 22nd cross-interrogatory—"My instructions from the said Mary Jane Scott were, to endeavour to effect an arrangement with the plaintiff, and to take care he would not leave the island; but I was left to my own discretion by the said Mary Jane Scott and John Lecomte as to the arresting the said John Bindon Scott, in case he did not consent to sign said bond. The said Richard Jones was opposite to the residence of John B. Scott, but not exactly outside the same, for the purpose of carrying into effect my instructions as already fully mentioned before by me."

To the 23rd cross-interrogatory—"I will undertake to swear positively that the said John Bindon Scott signed said bond without any intimation, suggestion, hint or statement from either me or the said John Lecomte, that I or the said John Lecomte were instructed to have him arrested for non-payment of an arrear of alimony, and that nothing whatever took place or was thrown out in the course of the said conversation upon the evening in question to induce or lead the said John Bindon Scott to suspect, imagine or believe that I would or could have him arrested on foot of said demand, if he did not enter into the arrangement proposed to him by me."

In another deposition Mr. Blewitt admits that Mr. Scott, at the close of the interview, said that he supposed by the laws of the country he might have been arrested, to which Mr. Blewitt replied that the laws of the island were very stringent, and that he might have been arrested for the alimony.

Now I collect from this, as a matter of necessary inference, that much must have taken place at this interview of which we have not the details fully given. The demand of the defendant Mrs. Scott was mentioned. It must have been stated that Mr. Blewitt had been employed and instructed by her to recover and enforce that demand, and to do so by some unpleasant means. That is implied

in what Mr. Blewitt states. The action already entered, the warrant already issued, may not have been mentioned; but the impression on the plaintiff's mind, and one evidently produced, and most likely to be produced, by such a visit at such a time, appears to have been that he would be arrested if he did not execute the bond. He stated to Mr. Blewitt, as the latter swears, that he supposed he might have been arrested, and Blewitt informed him, and with truth, that the laws of the island were very stringent. I do not want evidence of actual threats or verbal menaces in so many words in such a case as this. The visit itself at such a time and under such circumstances was in itself a menace surprising and alarming enough. The manner of Blewitt, if we may judge of it from his expressions, was stern and peremptory; his client had waited long; she was very anxious to have the matter closed; time could not be given to enable Mr. Scott to write to his solicitor; the bond must be signed that night; no terms could be made; the unpleasant thing which might occur could not otherwise be prevented. I think it would be idle, after that evidence, to say that the bond was executed by the plaintiff readily, freely and voluntarily.

If the case rested there, I should not hesitate to say, that of a bond so obtained no advantage could be taken. But this is not the bond now impeached. It has been cancelled, not, it is alleged, from any apprehension of its infirmity from the circumstances which I have referred to; but because it had been found that an alteration had been made in its terms which was not properly carried out to the end; and so it was not made payable in two years by yearly payments. The bond having originally been prepared for half-yearly payments, the word "half" was inadvertently left in, and an incongruity thus became manifest on the face of the instrument. This fact, taking it to be so, is some evidence of haste in the transaction of the evening of the 23rd.

The principal securities now impeached were executed on the next day, the 24th. They consist of the deed of covenant, a bond for £6000, and three promissory notes for £340 at three, six and nine months; and as the next step therefore in the proceedings, we come to the dealings of the parties on the 24th of October.

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It is stated in Blewitt's evidence, that at the close of the interview on the 23rd, and after the bond had been signed, a final agreement was proposed. Mr. Blewitt in his answer to the 23rd interrogatory says—"There was a proposal made at said interview, that a final agreement should be made between the parties, and that a deed should be entered into to that effect. I cannot now recollect by whom said proposal was made, by either me or the plaintiff; said plaintiff expressed himself most anxious that such final arrangement should be made, and he made an appointment with me to call at my office on the following day; I offered to go to the plaintiff's house, but he preferred coming to my office; said agreement was prepared by my orders. I do not recollect by whom such appointment was first proposed." Lecomte's evidence is to the same effect. I take these statements to be true, and that the plaintiff asked Mr. Blewitt to be concerned for him, and that the latter did accordingly enter on the negotiation of the 24th, as the advocate and attorney of both parties, and that as such he arranged the terms of the agreement. The plaintiff, he says, called on him on the 24th by agreement, and the transaction proceeded. I do not go through the details of it as given by Mr. Blewitt, but the result was that a fresh bond for £6000 was given, a sum of £50 was paid by Mr. Scott in cash, and an order was given by him on the receiver in the pending creditors' suit for £120, and the three notes which I have already mentioned were passed for £340—these smaller sums making the sum of £510, which is represented as being the amount of the arrears of the £250 a-year alluded to in the proposed compromise of 1842, giving credit thereout for the payments under the order of *interim* alimony. By the deed of agreement an annuity of £120 a-year, in addition, is secured to Mrs. Scott; and for all this the consideration given on the part of the defendants is the covenant of Mr. Lecomte to indemnify the plaintiff against the debts of Mrs. Scott, and covenants by him and her against the further prosecution of the suit in the Ecclesiastical Court, for restitution of conjugal rights, in case of the punctual payment of the sums secured by the bonds.

That is the transaction of the 24th of October, in which, as Mr. Blewitt states, he acted as the advocate for both parties,

under the instructions of each; that he did his best to carry out the plaintiff's wishes; that on their separate instructions he acted on his own sense of what he thought was just, having interviews with each, and going back and forward between them; that the plaintiff acted freely and voluntarily; that he was not intimidated; and that he expressed the strongest sense of gratitude to him for his conduct.

On Tuesday the 28th of October, a further security was given by the plaintiff—viz., a bond for £1500, as to which the actual evidence in the cause is unsatisfactory. All that Blewitt states about it is in his answer to the 49th interrogatory, in which he says—"The occasion of the execution of said last-mentioned bond was, in consequence of a communication to me by the said Mary Jane Scott" (but he does not give the time of the communication; Mrs. Scott, in her answer, swears that she wrote two letters, one to Mr. Scott and the other to Mr. Blewitt) "that she considered said settlement had not been sufficient, and that if the facts which she then stated to me were represented to the said plaintiff, he would make her a further allowance. In consequence of this, I waited on the said plaintiff on the evening of the 27th of said month of October last, and I then fully submitted to said plaintiff the whole of said statements as communicated to me by the said Mary Jane Scott. The said plaintiff then acceded to the substance of the wishes of the said Mary Jane Scott, and agreed to give a further bond for £500; but he objected to the time of payment, and also in certain respects to the payment of the interest as proposed by the said Mary Jane Scott. My first interview on such occasion with the said Mary Jane Scott occurred at her lodgings; but I cannot recollect whether I saw the said plaintiff at his own lodgings or in my office on said subject. On my so receiving instructions from the said Mary Jane Scott, I proposed a bond for the payment of £1500, with four years' interest thereon at six per cent. upon the 28th of October 1852, and with interest from that date until paid. The draft bond or paper writing marked 'G,' now exhibited to me was altered by me in the foregoing manner to enable the said James Corbett, my clerk, to prepare a draft of said bond for the perusal of

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said plaintiff, and which draft was accordingly so prepared by my said clerk. In my subsequent interview with the said plaintiff I submitted to him the terms of said draft as so prepared, and he then objected to said terms in the respects before mentioned, and he expressed his own wishes and views on the subject, and he requested me to make the best arrangement I could for him on said occasion. In consequence thereof I again saw the said Mary Jane Scott on the same evening, and I submitted the alterations and views of the said plaintiff, to which she did not then accede. On the following morning I received a note from her, stating that she would consent to Mr. Scott's wish to have said bond drawn at seven years, provided six per cent. was paid on the same by half-yearly payments from the 28th of October 1838. I deemed it right to consent to said modified terms as so expressed in said note of said Mary Jane Scott, and I accordingly wrote to the said plaintiff, stating that I had so agreed to same." The witnesses to the execution of the bond were Alfred Adams and James Corbett, and their evidence is, that it was executed by the plaintiff freely and voluntarily. It was made payable seven years after its date. The only other explanation of this part of the case is in the answer of the defendant, in which she states that the object of the bond was to provide a security by way of insurance on the life of Mr. Scott, and also to make compensation to her for being deprived of her income from 1833 to 1838; but the evidence in the cause does not sustain that statement, and therefore, as the case stands on the evidence, the bond would appear to be one altogether without consideration, entered into after the compromise and arrangement were complete, at the suggestion of Mrs. Scott, conveyed through the witness Blewitt.

The last transaction in the *Isle of Man* is one deposed to by Blewitt himself, viz., his endeavouring to have the proceedings of arrest against Mr. Scott taken off the file—a transaction which is not explained, and which certainly throws a cloud of suspicion on the compromise.

The securities being thus obtained, the parties separated, and on the 17th of November the bill in this cause was filed for an injunction. The plaintiff, therefore, has undoubtedly come promptly for

relief, if he is entitled to it, and the question on these facts is, whether this relief can be obtained? On the one hand it is said that the securities were improvidently obtained by fraud and surprise, and under circumstances entitling the plaintiff to insist that they should not be enforced against him. On the other hand the defendant claims them as the result of a compromise of doubtful rights, carrying out a previous arrangement of a similar import, executed by the plaintiff as a free agent, well aware of his position and his rights.

If, as I have already observed, I had only to deal with the bond for £6000, executed on the first interview on the evening of the 23rd of October, I should have little hesitation as to the decree to be made, save, perhaps, so far as I might consider the defence to that security proper for a Court of Law. I cannot look on that instrument as fairly obtained; and it is, in my opinion, open to all the impeachment which has been cast upon it by the plaintiff. It is plain that in that interview Mr. Scott was taken by surprise. He is visited by two strangers, one an advocate of the island, at a late hour of the day. He is excited by statements of the conduct of his agents in Ireland to Mrs. Scott, unsupported by proofs and, as regards the payment of the alimony, contrary to the fact, for nothing was said of her having received £200 in the September of that year. He is alarmed by an intimation that unpleasant consequences may occur to him from any delay in executing the bond brought ready prepared, of which he had no previous knowledge. He is refused time to consult his professional adviser in Ireland; his mind is attempted to be prejudiced against that person: and thus hurried and menaced he executed this bond for £6000 to two persons whom he never saw before, and without any security that he should receive a particle of consideration for it. It is stated by Mr. Blewitt, that he acted in this matter on the faith of the instructions of Mrs. Scott, and that he acted on the apprehension that the plaintiff might and would leave the island unless the arrangement was made. Often, and I may say painfully, as I have reflected on this case, I cannot reconcile these proceedings with any proper sense of pro-

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fessional propriety. That a person filling the situation of advocate and solicitor of any Court should think himself justified in acting on the statements of any adventurers who may seek his aid, without the slightest credentials or introduction, and proceed without further ceremony, and without any application to the opposite party, to take measures for his arrest, and should become personally active in obtaining an interview such as I have described—not for the mere settlement of a pecuniary demand which he was employed to recover, as to which there might be some reason to justify his interference, but the execution of a security to such an enormous amount from a person thus taken by surprise, who asked for time to consult his professional adviser, and who had none present to act on his behalf—all this appears to me, I confess, wholly inconsistent with just motives of rectitude and with fair dealing in a professional man. I do not wish to speak more harshly of Mr. Blewitt than is called for by the circumstances of the case. I am not prepared to derogate in the least from his previous character; but taking that character as high as it can be represented by his best friends, I must express my regret that in this instance his zeal for his client warped his better judgment and carried him far beyond the legitimate bounds of his professional duties.

But the main question in this case rests on the transaction of the 24th of October. In judging of it however, consideration must be given to the position the plaintiff was placed in by that of the 23rd. He had become bound in a security for £6000, without any consideration in the way of settlement on the part of the defendants. He was in the power of these parties and completely at their mercy, as well by means of that bond as in respect of the claim for alimony which was still hanging over him. Under these circumstances he endeavoured to make the best terms he could, to get some equivalent for this oppressive security in a release of Mrs. Scott's claims. According to the evidence of Lecomte, he had already expressed his anxiety for such a release in the interview on the evening of the 23rd, and he gave instructions to Blewitt to prepare it. On the 24th Blewitt became, according to his evidence, the professional agent of Mr. Scott in the business as well as of the defendant, and

he states that in this double character he settled the terms of the agreement between them. But as in the transaction of the 23rd he forgot his duty to himself, so in this of the 24th he forgot his duty to his new client. He was in a position in which he ought not under the circumstances to have acted for Mr. Scott at all, or if he did he should have taken some pains to put himself in possession of that information which would enable him to advise both parties with equal effect. It was surely his duty then at once to have put himself in communication with the regular professional adviser of Mr. Scott, to have ascertained the condition of his property and his means of paying the debt which he was incurring. It was his duty to have informed himself of the history of the ecclesiastical suit mentioned by the parties; and when we consider the various matters relative to the history and position of Mrs. Scott which had not been communicated to him, but which would have been told to him by Mr. Scott's former professional adviser, it is impossible not to see how little competent he was to act with due caution on his behalf in this matter. It would be too much perhaps to expect that he should inform Mr. Scott that there existed grounds on which the bond for £6000 might be impeached; but had any other professional man been consulted, of competent judgment, it is most probable that this would have been the very first advice Mr. Scott would have received. As regards the settlement to be obtained, it was surely of material consequence to ascertain, for Mr. Scott's security, the value of any contract she might make, and especially the value of the guarantee of Mr. Lecomte against her future debts. Nothing of all this was done or attempted on the part of Mr. Blewitt. The interests of Mrs. Scott, his original client, are completely secured; further terms for her benefit in money securities are made the condition of his release; and in truth the whole extent of Mr. Blewitt's interference on the part of Mr. Scott would seem to have consisted in procuring from her the execution of that release on such further terms as she chose to impose, in addition to the bond for £6000, by which Mr. Scott had been already bound by the transaction of the 23rd. Thus taking all to be true that Mr. Blewitt says about the readiness of Mr. Scott for a settlement, the arrangement of terms,

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his treaty between the parties, and Mr. Scott's gratitude to him for his exertions, it still leaves the case encumbered by the original transaction of the 23rd of October and tainted by all the infirmities attending it. The terms of the settlement were simply what Mrs. Scott chose to accede to. Mr. Scott was never from the moment he signed the bond on the 23rd allowed to be a free agent to break off the negotiation altogether, and Mr. Blewitt's position, whether given or assumed, of attorney for Mr. Scott, so far from operating for his protection, was in effect a delusion calculated to mislead him into the belief that all was right from the beginning and that he was getting at all events a reasonable equivalent for the sacrifice of his money and securities. What he did in fact receive was a present covenant from Mr. Lecomte, of which, without meaning to disparage that person, I may say, it is to Mr. Scott about the value of the paper on which it is written, and no more.

The agreement executed on that occasion purports to be "Articles of agreement entered into and made between John Bindon Scott of Mona Terrace, in the town of Douglas, in the Isle of Man, of the one part; Mary Jane Scott of Leeson-street, in the city of Dublin, of the second part; and John Lecomte, Esq., a trustee for the said Mary Jane Scott, of the third part." It recites, that unhappy differences existed between the said J. B. Scott and Mary Jane Scott, the proceedings in the Consistorial Court and the decree directing the sum of £120 per annum for alimony. It then contains a covenant by the plaintiff to pay or cause to be paid to the said John Lecomte and Alexander Buchanan the sum of £6000 with interest, at £6 per cent. half-yearly until the principal should be paid, which sum was secured by a bond of equal date. The agreement also contains a covenant by the plaintiff to pay to Lecomte and Buchanan and the survivor of them, and the executors, &c., of such survivor, the sum of £120 per annum, by half-yearly payments, in trust for Mary Jane Scott for her life, in lieu of alimony; a further covenant by the plaintiff to pay to the said John Lecomte in trust for Mary Jane Scott the sum of £510, of which £50 was to be paid in cash, £120 on the arrival of Mrs. Scott and Lecomte in Dublin, and the remainder by bills, one for £110 at three months, the

others for £110 at six months, and for £120 at nine months. "And in consideration of the due performance of the foregoing covenants and agreements by the said John Bindon Scott, the said John Lecomte doth, as trustee for and on the part and behalf of the said Mary Jane Scott, and the said Mary Jane Scott doth for herself and on her own behalf, covenant, engage and agree to and with the said John Bindon Scott, his executors and assigns, that so long as the said several sums of money and half-yearly payments shall be punctually paid and made to her, she will take no further proceedings in the said suit in the Ecclesiastical Court, but suffer the same to remain dormant therein, and finally upon payment of the said sum of £6000 with the interest thereon, she will withdraw and dismiss the said suit altogether, and not institute any further or other suit for the restitution of conjugal rights. And the said John Lecomte and Mary Jane Scott do hereby further covenant and agree, that the debts contracted by the said Mary Jane Scott now due shall be paid by her out of the money to be received from the said John Bindon Scott, and that no part of the same nor of any future debt which by her may be contracted shall be made chargeable against the said John Bindon Scott, but that they the said John Lecomte and Mary Jane Scott shall indemnify the said John Bindon Scott, his executors and assigns, and keep him and them harmless from all such debts and demands." The agreement is executed by the plaintiff, by Mrs. Scott and Lecomte, and is attested by Blewitt.

Mrs. Scott in her answer rests this transaction on the basis of its being a compromise, between her and Mr. Scott, of the controversies between them, and being a just and reasonable arrangement of them and fairly obtained. In that way the case was argued by her Counsel with great ability and research. They relied on some authorities which lay down a clear principle, and one which appears to have been the law on the subject from the earliest times.

In the case of *Attwood v. ———* (a), the defendant, who was an attorney, entered into the compromise after consulting his Counsel;

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(a) 1 Russ. 357.

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Lord Gifford says:—"If the claim were fairly and *bona fide* made by Mrs. Shackle against W. on the ground that he had been guilty of such negligence as would entitle her to enforce a demand against him in law or equity, and if W. after due consideration not only admits his liability but compromises the claim, and for that purpose enters into an agreement; the compromise of such a claim entered into with due deliberation, even if it were doubtful whether the claim were such as could have been made effectual, is a sufficient consideration, both at law and in equity for such an agreement." Then he says again, p. 359:—"There is no misrepresentation on Mrs. Shackle's part, either as to the nature or as to the extent of her demand; W. had ample time and opportunity to consider duly his liability; he did do so, acknowledged his liability and entered into this agreement."

So in *Naylor v. Winch* (a), Sir John Leach says:—"Where a compromise of a doubtful claim is entered into fairly and with due deliberation, and upon consideration, a Court of Justice cannot inquire into the supposed adequacy or inadequacy of the consideration." * * * It is enough, to support this deed, that there was a doubtful question, and a compromise fairly and deliberately made upon consideration."

In *Cory v. Cory* (b) Lord Hardwicke rested his judgment on the fact that the agreement was "to settle disputes in a family, and a reasonable agreement."

In *Stapilton v. Stapilton* (c), Lord Hardwicke says that the agreement was "to save the honour of the father and of his family, and was a reasonable agreement."

Now these cases and all that are to be found on the subject state no unqualified proposition such as would make all compromises equally binding. They must be fairly entered into, they must be on due deliberation. Apply that to the present case. Can the transaction be considered fair which was consummated on the evening of the 23rd? Can that of the 24th, which was based on it

(a) 1 Sim. & St. 565.

(b) 1 Ves. 19.

(c) 1 Atk. 5.

and in which the pressure of the bond for £6000 which had already been executed added to the difficulties of Mr. Scott's position, have greater validity? Can the interview of the 23rd be thought of as one in which Mr. Scott could be held to have had due deliberation, or can the employment by him of Mr. Blewitt as his professional adviser on the 24th, circumstanced as that gentleman was and acting as he did in that capacity, be considered as investing the arrangement with the character of a settlement on due deliberation and under *bona fide* professional advice? It is a strong part of the case of *Dunnage v. White (a)*, that the solicitor of the parties who obtained the impeached instrument was the only professional person employed in the transaction, and that there were strong grounds for believing that he did not understand the rights of the parties. Did Mr. Blewitt rightly understand the situation of the parties? Did he take the proper steps to inform himself of it? His own evidence shows that he was ignorant of the material circumstances. He knew nothing of the trials; he knew nothing of the condition of the estate of Mr. Scott; he knew nothing of the circumstances of Lecomte. He drew an agreement which recites nothing more than might be written of any matter of difference between husband and wife. He seems to have believed that there was no reason why those parties might not resume that position. The agreement, in truth, though strangely enough it does not mention that Mrs. Scott was the wife of Mr. Scott, gives her by necessary implication the name and position of his wife, and leaves her free to use them as she pleased, save so far as the security of Lecomte might protect him from her debts. Was this then a reasonable compromise? So large a sum as £6000 was to be paid to her by a tenant for life of an estate, so incumbered that he had but £600 a-year to live on, beside nearly a year of that income in money and bills, and £120 a-year for life, for which he got merely a security against proceedings in the Ecclesiastical Court, which, so far as that Court was concerned, was it seems a perfect nullity, and the security as I have said of Lecomte, valid no doubt in law, but worthless in point of value. I cannot reconcile this case with any of the principles concerning compromises that have been

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(a) 1 Swanst 150.

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referred to. In my mind it was an improvident contract, obtained by surprise, without adequate consideration and without due deliberation and advice, which the language of the cases requires in order to give effect to such a contract.

Evidence has been given of the weakness of mind of Mr. Scott, of his being timid and nervous and liable to be intimidated and unable to act correctly without advice. I do not rest much on that evidence; but it is not undeserving of consideration, for in truth it is rendered probable by the history of this transaction. It is of course not pressed in argument that, of itself, a contract with such a person would be void. I cannot declare him to be incapable of transactions of business; but I cannot and I do not disregard that evidence, taking it in connection with the attendant circumstances of the case.

The execution of the bond for £1500 is the last stage in the Isle of Man transactions. I have stated the evidence respecting it. It is admitted to be without consideration. It is not put forward as a gift; but as a means for securing to Mrs. Scott the advantage of the arrangement of the 24th, obtained at her instance; as it is manifest from Mr. Blewitt's evidence that she dictated the terms of it, and that he sacrificed to her views the interest of his client, as he called Mr. Scott. The only consideration which is suggested is to provide a fund for the insurance of the life of Mr. Scott for the £6000 already agreed on. It was also stated by her that it is to make her a compensation for her maintenance from 1833 to 1838, which latter period had been fixed as the time for calculating the commencement of the annuity of £250, in respect of which the sum of £510 was ascertained; but the witnesses throw little light on this part of the case. Mr. Blewitt says he held some communications with Mr. Scott about it; that he mentioned facts to Scott which were told by the defendant; but he does not state the particulars of those facts, and it remains on the evidence purely without consideration. The utmost that can be insisted on by Mrs. Scott is, that it was connected with the prior arrangement and given as a further means of carrying out that arrangement itself, and being thus

unexplained it cannot stand in this Court. I would gladly have had more evidence on the subject of this latter bond. Lecomte is mentioned in the answer as having taken a letter from Mrs. Scott to Mr. Scott on the subject of it; and it might have been, though this is most improbable, that it was agreed to so deliberately and with so much consideration on the part of Mr. Scott as to have materially affected the general aspect of this case. The parties, however, interested in supporting it have left me little to go upon except the proof of its formal execution, and I must take the evidence as I find it; and taking it so, I am unable to see any proof of consideration for this latter bond, and I am induced to believe from the conduct of the parties in the other transactions that the communications respecting this bond would not, if disclosed, have tended to support its validity.

On the whole of the case, I think the plaintiff is entitled to an injunction against enforcing these securities. I have not thought it necessary to allude to the proceedings criminal and ecclesiastical which have taken place since these transactions in the Isle of Man. Whether it was or was not prudent in Mr. Scott to institute those proceedings it is not for me to consider, and they cannot, in my mind, touch the merits of this case. I must decree a perpetual injunction against enforcing the securities. They must be delivered up or brought into Court. I give no costs on either side.

Reg. Lib. 96, fol. 135, 1847.

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Ex parte HODGENS; In re HODGENS.

UPON the marriage of Thomas Hodgens with Anne Walker in 1828, a sum of £22,407. 12s. 6d. stock of the Governor and Company of

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stock in addition to the annual dividend, *Held*, not to be in the nature of annual profits, but an accretion of the capital, the interest of which only belongs to the tenant for life of stock which is in settlement.

A bonus declared by the Bank of Ireland on their

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the Bank of Ireland, to which she was entitled, was settled upon trust to pay the interest, dividends and yearly proceeds during the life of Anne Hodgens to her sole and separate use, and after her death to pay, assign and transfer the principal sum to the child or children of the marriage. The only issue of the marriage was Thomas Walker Hodgens a minor.

On the 11th of December 1846, the Governor and Directors of the Bank of Ireland, by a special report to the Court of Proprietors, stated that "the favourable result of the last four years has decided the Governor and Directors to recommend the Court of Proprietors to sanction a bonus of five per cent on the capital stock of the corporation, to be paid in addition to the dividend of four per cent. now recommended."

The report was laid before the Court of Proprietors, and adopted by them at a meeting the same day.

Thomas Walker Hodgens the minor remainderman presented his petition to the Court by his father and next friend, stating the foregoing facts, and submitting that the bonus so declared by the Bank should be deemed capital, and invested upon the trusts of the settlement.

Argument.

Mr. *Dickson*, for the petitioner.

The bonus does not go to the tenant for life as a dividend on the bank stock, but is to be considered as accumulation, and to be placed to the capital: *Brander v. Brander* (a); *Irvine v. Houston* (b); *Paris v. Paris* (c); *Clayton v. Gresham* (d); *Witts v. Steere* (e); *Hooper v. Rossiter* (f); where the result of all the cases is stated by Alexander, C. B., to be, that wherever the addition was made clearly and distinctly as a dividend only, the tenant for life was to have it, but wherever it was not clearly given as a dividend, it was considered as an accretion of capital, divisible among the proprietors. As to the terms used in the settlement, "interest,

(a) 4 Ves. 800.

(c) 10 Ves. 185.

(e) 13 Ves. 363.

(b) 4 Ves. 801, n.

(d) 10 Ves. 288.

(f) 1 M'Cl. 536.

dividends and yearly proceeds," such expressions are considered too nice circumstances to found any distinction on. The only case in which extraordinary profits of such property were given to the tenant for life is the case of *Barclay v. Wainwright* (a), where the Bank added the dividend of £5 per cent. to the usual one of £3½ per cent., making the whole one half-yearly dividend of £8½ per cent. and including it in the one warrant; and the Court held it was made by the resolution of the Bank the regular dividend, and as such payable to the tenant for life. The present case must also be decided on the character which the Bank of Ireland, by its resolution, have impressed on this sum of £5 per cent. It cannot be contended that it is, as in *Barclay v. Wainwright*, an increased dividend. It is called a bonus, while the other is called the dividend of £4 per cent. in addition to which it is to be paid.

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Mr. Hughes and Mr. J. D. Fitzgerald, for Mrs. Hodgens.

The language of the settlement shows that any profits to arise from the principal amount of bank stock were to be paid to the tenant for life. Here the accumulation must have taken place since the year 1821, when the capital stock had increased £500,000, and was then divided amongst the proprietors, under statute 1 & 2 G. 4, c. 72. The principle which should govern this case is that acted upon in *Barclay v. Wainwright*, where the Court gave the accumulation to the tenant for life. *Paris v. Paris* has been disapproved of by every Judge who has since had occasion to consider it. The case of *Witts v. Steere* is no authority against the tenant for life here, as it was decided on the terms of the will, the Court holding that the testator, by the words "dividends and profits, as the same shall become due," did not mean a bonus, which is in the discretion of the Bank. *Clayton v. Gresham* appears to have been decided without argument. The terms of the resolution are favourable to the tenant for life, as showing that this sum has been accumulated from year to year.

The LORD CHANCELLOR.

It does not appear when the surplus, out of which the Bank of

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Judgment.

(a) 14 Ves. 66.

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Ireland has declared this bonus, may have accumulated. For any thing that I know to the contrary, a portion of it may have been accumulations previous to the marriage of Mr. and Mrs. Hodgens in 1828. I must therefore deal with the question raised in this case upon the terms of the resolution of the Bank in declaring this bonus of £5 per cent., rather than upon any rights which might be supposed to accrue either to the tenant for life or the remainderman, in respect of the particular time when the accumulations of the bank stock may have accrued. The question then is, what is the nature of this money? By their special report, the Governor and Directors of the Bank recommended the Court of Proprietors to sanction a bonus of £5 per cent. on the capital of the Bank in addition to the dividend of £4 per cent. The report being confirmed, the dividend and bonus were both declared. Now, I do not at all dissent from the decision made by Lord Eldon in the case of *Barclay v. Wainwright (a)*. His Lordship in his judgment intimates that he came to that decision upon the opinion that the £5 per cent. there given by the Bank of England was in the nature of the annual dividend on the stock, and not accumulations of capital. "As the case now stands," he observes, "I have not the means of considering it more or less than a declaration in a due execution of the right and the duty of the Bank, that the dividend which the proprietors ought to receive is a half-yearly dividend of £5 per cent.; and upon that resolution in this particular case, without stating what the Court may be called upon to do in other cases, my opinion is, that the tenant for life is entitled to this dividend of £5 per cent." The decision in that case is different from that in every other case, in each of which these accumulations are treated as capital.

Thus in *Brander v. Brander (b)* the £5 per cent. annuities, divided among the proprietors of bank stock by a resolution of the Company, were considered as an accretion to the capital, and the tenant for life was held to be entitled only to the dividends upon them.

(a) 14 Ves. 66.

(b) 4 Ves. 800.

In *Paris v. Paris* (a) accumulations of money, divided amongst the proprietors of bank stock in the shape of a dividend at the rate of £5 per cent, were also held to belong to the capital; and Lord Eldon did not consider that it made any difference whether the profits so divided were money or stock. In my opinion, no sound distinction exists whether it be money or stock; both arise from an accumulation of the profits of the Bank, and flow from the same source, and are therefore to be subject to the same rule. There are many cases, no doubt, where, if we were to look into the calculations and see when the profits arose and at what time the rights of the tenant for life commenced, it would be quite just to give these occasional profits to the tenant for life; but we cannot argue on such states of facts, nor did Lord Eldon consider it a proper subject of inquiry in any case to ascertain when these profits accrued. Suppose the tenant for life died shortly before the Bank had declared the extraordinary dividend, could it be contended that his executors would be entitled to any portion of it? or that an inquiry to ascertain how much should belong to his estate would be directed? The Court avoids inquiry of this nature by holding, that if the sum paid by the Bank be clearly a dividend, as in the case of *Brander v. Brander*, it belongs to the tenant for life; but that if it be not in the shape of a dividend, it must be considered as an accretion of the capital, the interest on which alone will belong to the tenant for life. But it is indifferent to the Court in what shape the payment is made, whether as money or stock; and the Court will never, as I have said, enter into a minute investigation as to the period during which it was accruing; such inquiries would be endless, and would lead to Equity suits in almost every case.

For these reasons, and considering the terms of the resolution, it occurs to me that this bonus must be considered as part of the capital, and be placed upon the trusts of the settlement of Mr. and Mrs. Hodgens, giving her a life interest in the dividends or profits upon it, the corpus to belong to the minor in remainder. As this is, however, a question of much importance, and one which must materially

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 ———
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(a) 10 Ves. 184.

1847.
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 —
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affect a great many suitors of this Court, I had thought of calling upon the Master of the Rolls to assist me with his advice upon the matter; but upon consideration I do not entertain any doubt on the point.

TUCKER v. BAKER.

Jan. 29, 30,
 Feb. 3, 25.

A devise of lands in trust for A, a reputed son, for life, and after his decease for and to the first and every other son of A successively in tail male, and in default of such issue, to the daughter or daughters of A to hold to them, if more than one, and their heirs as tenants in common; and in default of issue of the said A, to and for testator's heirs. *Held*, that A took only an estate for life, and that no remainder in tail to him could be implied after the limitation to the daughters.

The doctrine and cases respecting the construction of such devises, reviewed.

HENRY BAKER being seised in fee-simple of certain estates in the barony of Shillogher and county of Kilkenny, by his will bearing date the 26th of April 1821 devised these estates to the late Right Honorable Charles Kendal Bushe, his heirs and assigns, upon trust in the first place to raise and pay two annuities of £50 each, thereby bequeathed to his reputed sons Henry and Arthur for their lives, and subject thereto the testator declared the trusts to be as follows:—

“I declare that the above devise of all my several properties in land is in trust for, and I hereby devise the same to my above-mentioned reputed son John Baker for and during the term of his natural life, and from and after the decease of the said John Baker, for and to the first and every other son of the said John Baker, lawfully issuing, according to seniority of age and priority of birth, in tail male; and in default of such issue, to the daughter or the daughters of the said John, to hold to them, if more than one, and their heirs as tenants in common, not as joint tenants; and in default of issue of the said John Baker, to and for my own right heirs for ever.” And the testator declared that his said son John, when in possession of the said estates, should have power, by any deed or deeds under his hand and seal, duly attested by two or more subscribing witnesses, to charge and incumber the same with any yearly sum not exceeding £300, as a jointure for such wife as he might marry, and with

any sum not exceeding £2000 as a provision for the younger children of such marriage, to be divided amongst them in such manner and under such appointments and directions as should be provided by the said deed; and also should have power to make leases of the whole or any part thereof, in possession and not in reversion, at the best improved yearly rent which could be reasonably had from a solvent tenant or tenants, without fine or other consideration for making the same, for a term not exceeding three lives or thirty-one years.

The testator died in 1822 without having revoked or altered his will, and without leaving any lawful issue. He had only one brother, who died in his lifetime unmarried and without issue, and an only sister, Henrietta Baker, who intermarried with Martin Tucker the plaintiff's father, and died in the year 1828, leaving the plaintiff her eldest son and heir-at-law.

John Baker entered into possession of the devised estates upon the death of the testator, and intermarried with the defendant Sophia Baker in the year 1825. Upon the 26th of February 1844, he executed and enrolled a disentailing deed under the Act for the abolition of fines and recoveries, reciting that he was seised under the will of an estate for life, with remainder to his first and other sons in succession in tail male, with remainder to his daughters and their heirs, with remainder to himself in tail general, and thereby conveyed the estates to a trustee to the use of himself in fee.

Shortly after the execution of this deed, John Baker died, having previously made his will on the 9th of March 1844, and thereby left to his wife the defendant Sophia Baker all his freehold and other property for ever.

Sophia Baker having entered into possession of the estates upon the death of her husband, the plaintiff filed the bill in this cause, claiming to be entitled to an estate in fee in the lands, upon the true construction of the will of Henry Baker, and praying to be decreed so entitled and to be put into possession accordingly, and for consequential accounts.

The defendant, by her answer, insisted that, under the limitations of the will of Henry Baker, John Baker her husband was seised of

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an estate tail, and that he acquired the fee by the disentailing deed, and that as his devisee she was now seised of the estates in fee-simple.

The cause now came on to be heard, and the only question was that upon the construction of the will of Henry Baker.

The *Attorney-General*, Mr. *Butt*, Mr. *F. A. Fitzgerald* and Mr. *T. R. Henn*, for the plaintiff.

John Baker took only an estate for life, and no remainder in tail can be implied in his favour. In the gift in "default of issue of John Baker" the word "issue" refers to the sons and daughters before mentioned in the will. Of the cases on the construction of such gifts there is one class in which the words have been held to give the first tenant for life an estate tail; another class in which they give to the first taker an estate for life only. If the estate is given generally or for life to one, and then "in default of issue" of the first taker, over, the first taker is held to take an estate tail, in order to effectuate the intention, which is, that the estate should not go over as long as there are any issue of the first taker; and for the like reason the gift to the first taker and his heirs, followed by the same words, will be cut down to an estate tail. But when an estate is given to A for life, and then to the sons and daughters of A, and then in default of such issue, over, the word "such" clearly confines "issue" to the species of issue before mentioned: *Denn d. Breddon v. Page* (a); *Foster v. Romney* (b): but that word is not indispensable, and the same construction will be followed, though it does not occur: *Goodright d. Docking v. Dunham* (c); *Ginger v. White* (d); *Bamfield v. Popham* (e); *Malcolm v. Taylor* (f): in all which, words importing a general failure of issue following an antecedent gift to a particular class of issue, have been limited to that class, on inferences of such an intention no stronger than exist here. *Lees v. Moseley* (g) shows that "issue" is a more flexible word than "heirs;" and if violence is done on our view to the natural meaning of "issue" in

(a) 3 T. Rep. 87 n.

(c) Doug. 364.

(e) 1 P. Wms. 54.

(b) 11 East, 594.

(d) Willes, 348.

(f) 2 R. & My. 416.

(g) 1 Y. & Col. 589.

excluding its effect to create an estate tail, greater violence is done to the word "heirs" on the defendant's construction, in excluding its natural meaning of a fee-simple in the preceding gift to John Baker's daughters, which, on that construction, must be cut down. Nothing can be inferred from the use of the word "such" in one passage and not in the other in this will; for when the testator used the word he had it in his mind to distinguish between the children whom he had just mentioned, namely, sons, and those whom he was about to mention, namely, daughters; but having mentioned both, he refers to them generally as issue. Besides it cuts both ways; for in the precedent passage the testator uses it after an estate tail, and the inference would be that when he omitted it he did not mean to cut down the estate limited immediately before. The same thing occurred also in *Ginger v. White (a)*, and did not vary the construction. Neither can an argument be founded on a presumption against intestacy; for, though there is such a presumption in cases of personal estate, there is not where the devise is of realty, from the favour shown to an heir-at-law. The gift over to the testator's heirs, though void as a devise, is sufficient to found arguments for intention. The intention of the testator is the only criterion. The defendant's construction assumes he intended to prefer the daughters of daughters of John Baker to the daughters of sons of John Baker, which is an absurd intention to impute to him; and the argument for the defendant as to intention, viz., that giving John Baker only an estate for life will exclude the daughters of his sons entirely, is not so strong. Besides, the effect of applying the defendant's construction to remedy this would be, that the daughters of a son would take the entire estate, while the daughters of daughters would take distributively. But any such considerations are too remote to found an argument of intention upon; for such granddaughters were probably not in the testator's contemplation at all; it is unlikely he contemplated providing not only for unborn children, but for unborn children of unborn children. Nor are his son's daughters quite excluded, for they might take under the gift to his daughters as heirs to their aunts. The argument there-

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(a) Willes, 348.

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fore is not so strong as it was in *Blackborn v. Edgeley* (a), where it was overruled. No inference can be drawn from the chance of escheat, for the intervention of the trustee would prevent that, and there would only be a resulting trust. The cases of *Blackborn v. Edgeley* and *Morse v. Lord Ormond* (b) directly rule the present case in favour of the plaintiff, and it is impossible to suggest any substantial distinction. The fact that in *Blackborn v. Edgeley*, after the limitations to the first and other sons of the first taker in tail male, the estate was limited to the daughters in tail general, while here it is limited to them in fee, is, for the reason already given, in favour of the plaintiff's construction, and presents a new difficulty to the defendant; for he must show that the fee-simple is cut down to an estate tail, or otherwise any remainder to John Baker would be void. Therefore the defendant asks the Court, in fact, to make a new will by cutting down the estate in fee, given by express and technical words in a will most technically framed; and then to overrule two direct authorities to give effect to the will so made. If the estate in fee to the daughters be not cut down, no remainder to John Baker can exist, and if it be cut down it makes this case precisely the same as *Blackborn v. Edgeley*. The only argument for cutting down the gift to the daughters is founded on the very words in question themselves, and on *Doe v. Halley* (c). A gift to one and his heirs is never thus cut down to mean "heirs of the body" except when the testator shows a plain intention of excluding some person who would take if it was construed to give the fee-simple. Thus in the common case of a gift to A and his heirs, and in default of his issue over, there is a clear intention to exclude A's collateral heirs; that plainly does not apply here. So, when the first devise is followed by a gift to one who might be A's heir, a similar intention to limit the first gift is evidenced; but that does not apply here, for John Baker being illegitimate, his daughter's heirs could never be heirs of the testator. So, when the devises are to persons and their

(a) 1 P. Wms. 600.

(b) 5 Mad. 99.

(c) 8 T. R. 5.

heirs, but the testator intends that they should take successively or as purchasers. These latter doctrines are the ground of decision in *Doe v. Halley*, which is therefore inapplicable. The very distinction which thus occurs here was taken in *Nottingham v. Jennings* (a), which is against so restraining the words; and *Tilburgh v. Barbute* (b) is in point, showing that a devise to one and his heirs, and if he dies without issue, then over, will not create an estate tail in the first taker. Even if these words could be cut down to give an estate tail to John Baker's daughters, it will be necessary, in order to carry out the defendant's construction, to imply cross remainders between them, which cannot be done: *Doe d. Comberbach v. Perryn* (c). It is not a fair way of putting the question, to say the estate tail in John Baker is to be first implied, and then that there is no difficulty in cutting down the estate in fee given to his daughters, for the question is, whether the inference of intention is strong enough to do both at once. The case of *Lewis v. Waters* (d) went on the intent to give successive estates, and does not at all apply, and is besides questioned in *The King v. Stafford* (e). The distinction suggested between this case and *Morse v. Lord Ormonde*, on the existence of the term of years in the latter case, is unimportant, for it appears from the note in 1 *Russell* (f) that the decision proceeded on grounds wholly irrespective of that circumstance, and no allusion whatever was made to the term. It is there truly stated that, in no case was an estate tail implied from the words "in default of issue," for the mere purpose of letting in the sons of daughters. And *Lanesborough v. Fox* (g) and *Jones v. Morgan* (h) do not bear out the answer given to *Morse v. Lord Ormonde*. Neither it nor *Blackborn v. Edgeley* are at all affected by *Doe d. Gallini v. Gallini* (i), which is quite reconcilable with them, and the doctrine of them has been repeatedly since approved of and recognised: *Ellicomb v. Gompertz* (k); *Tarback v. Tarback* (l); *Stanley v.*

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(a) 1 P. Wms. 23.

(b) 1 Ves. 89.

(c) 3 T. R. 484.

(d) 6 East, 237.

(e) 17 East, 521.

(f) 1 Russ. 407.

(g) Cas. temp. Talb. 262.

(h) Fearne App. 111.

(i) 3 Ad. & El. 340.

(k) 3 My. & Cr. 127.

(l) 2 Jarm. Wills, 375.

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Lennard (a); *Burton's Real Property*, p. 223; 2 *Jarman on Wills*, p. 389. In *Doe d. Gallini v. Gallini* the contest was not whether the word issue was referential, and therefore whether the tenant for life was to remain such or was to be considered tenant in tail by implication, but whether the words created immediate estates tail in the tenants for life or tenancies in tail in remainder after the estates (whatever they were) given to their children; besides, there the devise was not to all the immediate descendants of the tenant for life, and there were words of stronger intention than there are here. It is a mistake to say the doctrine of that case is new; it is, at least, as old as *Doe v. Halley (b)*. That there is not enough to warrant the implication contended for by the defendant, appears from Lord Mansfield's definition of necessary implication cited in *Fearne on Con. Rem.*; *Jones v. Morgan (c)*. *Turke v. Frencham (d)* is another authority directly in the plaintiff's favour. Assuming that the testator did not intend the estate to go out of John Baker's family while there were any descendants of his, is the basis of the defendant's argument, and it is begging the question. There is no reason to infer that illegitimate descendants were the testator's principal care: on the contrary, two of them got only small annuities under the will, and the presumption is against a testator being as careful to include illegitimate descendants as he would be to include legitimate. The whole inference is founded on the very words in dispute, which are said to indicate the general intent, to which the particular intent is to yield. It has been truly said that this rule as to general and particular intents has often the effect of defeating both: *Jesson v. Wright (e)*. The true meaning of the rule is what is there laid down, viz., to give technical words their meaning unless altered by subsequent inconsistent words. And here the testator shows he understood the meaning of technical words. *Bamfield v. Popham (f)*; *Roe d. Kirby v. Holmes (g)*. Here the particular intent to give a life estate to John Baker is clear, and there is not merely

(a) Eden, 87.

(b) 8 T. R. 5.

(c) *Fearne*, App. 589.

(d) 2 Dyer, 171.

(e) 2 Bligh, 1.

(f) 1 P. Wms. 54; S. C. Salk. 236.

(g) 2 Wils. 80.

the usual difficulty of extending that estate to an estate tail, but the greater difficulty of implying an estate in tail general to go to the same person to whom the testator had expressly given an estate tail of a different nature, viz., tail male. *Ellicomb v. Gompertz* (a) does not conflict with the plaintiff's view of this case, and is so far an authority in his favour that it shows the gift in "default of issue" may have a referential meaning. *Bristow v. Boothby* (b) is not *ad idem*; but if it was, and conflicts at all with *Morse v. Lord Ormonde*, the latter case was heard after it on appeal, and should be considered as overruling it. The authorities in which a question of construction arose on two instruments are quite inapplicable.

The *Solicitor-General*, Mr. Sergeant *Warren* and Mr. *Christian*, for the defendant.

We contend that the will gave an estate for life to John Baker, remainder to his sons in tail male; remainder to his daughters in tail general; remainder to John Baker in tail, the last mentioned limitation being implied from the gift over in default of issue of John Baker. In cases like this, wherever the word "issue" was confined to a less class than issue generally, there was something to show the testator meant by it a class less universal, which class of issue was otherwise defined in the will. The introduction of the word "such," after previous mention of a particular species of issue, necessarily has this effect. That does not apply here, and therefore the doctrine of *Denn v. Page* (c), *Foster v. Romney* (d), and that class of authorities, is wholly inapplicable. The authorities most in point for the plaintiff's construction, making the word "issue" referential, are *Blackborn v. Edgeley* (e) and *Morse v. Lord Ormonde* (f); but they are both distinguishable. In *Blackborn v. Edgeley* there was not a gift over like that here after the estate to John Baker in default of *such* issue, which indicates an intention to distinguish between the meaning of the word as there used and when it is again repeated, the first word "issue" only being referential. *Caulfield*

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(a) 3 My. & Cr. 137.

(b) 2 Sim. & St. 465.

(c) 3 T. R. 87.

(d) 11 East, 594.

(e) 1 P. Wms. 600.

(f) 5 Mad. 99; S. C. 1 Russ. 382.

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v. *Maguire* (a), *Carter v. Bentall* (b), are distinct authorities that in such circumstances "issue" must be differently construed in the two passages, the testator himself having confined it in one of them. In *Blackborn v. Edgeley* the limitation over was also to persons expressly named as objects of the testator's bounty, and not, as here, a vague inoperative one to the testator's heirs; so there was the less reason for implying a limitation which would, in favour of a presumed object of the testator's bounty, defeat an estate to one expressly named. There too the testator expressed a wish to continue the family name, and that afforded an argument for intention which does not exist here. In *Morse v. Lord Ormonde* the limitation of the term of years made an important element in the construction, and the question arose on a different point; and Lord Eldon, on appeal (c), said he had great difficulty to reconcile his decision with the authorities. In both these cases (*Blackborn v. Edgeley* and *Morse v. Lord Ormonde*) the decisions were founded on the intention gathered from the whole will, which was inferrible from a different state of circumstances from that which exists here. The fact that the testator was here providing for the descendants of an illegitimate son, who could never take as his heirs, is an important point of difference. In gathering the testator's intention, each case must rest on its own circumstances, and precedents are not to be implicitly followed: *Stanley v. Lennard* (d). The only rational intention to impute to the testator here is, to include all John Baker's descendants, which must be done by giving, after the successive estates to his sons, a remainder in tail general to his daughters, and then in default of *all* issue of John Baker, to the testator's heirs, thus giving an estate tail to John Baker in remainder. Besides, when those cases (*Blackborn v. Edgeley*, *Morse v. Lord Ormonde*) were decided, the doctrine under which this can be done, and which was established by *Doe d. Gallini v. Gallini* (e), was not understood. It is a new doctrine, which gives to the person who takes first a life estate a remainder in tail general, after interposing the estates tail to the sons and daughters. The Chancellor,

(a) Jo. & L. 176; S. C. 8 Ir. Eq. Rep. 182.

(b) 2 Beav. 551.

(c) 1 Russ. 382.

(d) Ambl. 355; S. C. 1 Eden, 87.

(e) 3 Ad. & El. 340.

in *Blackborn v. Edgeley*, thought the only way he could imply an estate tail would be by giving an immediate one, enlarging the estate given to the tenant for life, which must in some respects have defeated the intention. In *Jarman on Wills*, vol. 2, p. 398, the author states the proposition guardedly, which, in his edition of *Powel on Devises*, he stated more confidently, this case of *Doe v. Gallini* having been decided between the publication of the two works. The authority of the cases so relied on is therefore shaken, if they be not distinguishable. The extended construction of the word "issue," which we contend for, in the limitation preceding the gift over to the testator's heirs here, is similar to the construction adopted in *Franks v. Price* (a); *Stanley v. Lennard* (b); *Attorney-General v. Sutton* (c); all which are in our favour on this part of the case. The intention of the testator being the ground of construction, it is to be inferred from what he would have wished to do in every event; and the plaintiff's construction wholly excludes some of John Baker's descendants, who are not included in the previous limitations, *ex. gr.*, daughters of a son; for though they might in some events take as heirs of his daughters, yet, if he died without daughters, they could never take, John Baker being illegitimate; if he left an only son who left an only daughter, the plaintiff's construction imputes to the testator the intention that the property should escheat to the Crown and not go to that daughter, as John Baker's descendants could never take as the testator's heirs. And so, if the estate once vested in John Baker's daughters, it might escheat to the Crown on their death before it would come back to the testator's own heirs. Several other descendants of John Baker might be excluded in like manner; *ex. gr.*, if he left daughters, one of whom married twice, and there were children of both marriages, the children of the second would be wholly excluded, as being of the half-blood they could not have inherited from the children of the first, and there would be no limitation to include them; or if John Baker himself married twice, and had a son of the first marriage,

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(a) 3 Beav. 182.

(b) 1 Eden, 86.

(c) 1 P. Wms. 754.

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who took the estate and left a daughter, and had a daughter of the second marriage who left no issue, the descendants of his granddaughter could never inherit. These reasons show that it is more probable the testator meant to use the word "issue" in the general sense in which we contend, even supposing the onus was on us to show such an intention. But the onus is the other way. The word is similar to "heirs of the body," and naturally not a word of purchase, but of limitation : *Slater v. Dangerfield* (a). In all gifts over on failure of issue it must be clearly shown that the intention was to exclude its general meaning of all issue ; such an intention must be negatived before a limited meaning will be given to the word ; on the other hand, the probability of such being the intention is sufficient to prevent its having a construction limited to objects previously defined : *Ellicomb v. Gomperiz* (b) ; *Franks v. Price* (c). The onus therefore is on the other side to show that "issue" cannot mean all descendants, which is its natural meaning. When there is a devise to A, and then devises to classes of issue, and a remainder over in default of issue, the point for decision always is whether in fact none other except the intervening classes mentioned are objects of the testator's bounty. No inference can be drawn from the provision for younger children, as that might be necessary on any construction of the will. The ultimate devise to the testator's heirs is void, and on the plaintiff's construction they would take by descent in the events for which we say he has provided ; and the presumption against intestacy is therefore in our favour. The true test of the meaning of such limitations over on death "without issue," is to look back to the previous limitations in the will, and if they are capable of carrying the estate to all the issue of the person whose issue are mentioned, the words are referential and add nothing ; but if there is a chasm in the previous limitations, the Court will include the class which would be thereby omitted, and to do so imply an estate tail. Thus, if there be a gift to a father for life, remainder to some of his sons in tail male,

(a) 15 M. & W. 263, 272.

(b) 3 My. & Cr. 127.

(c) 3 Beav. 182.

omitting to provide for *all* the sons, a devise over in default of issue of the father, in order to include all, will give an estate tail: *Langly v. Baldwin* (a); *The Attorney-General v. Sutton* (b); *Allinson v. Clitheroe* (c); *Stanley v. Lennard* (d). So where, though all the sons and daughters are mentioned, yet life estates only are given, the same construction is applied to a gift over in default of issue of the father: *Wright v. Lee* (e); *Parr v. Swindells* (f). So where all sons and daughters are included, and all get estates tail, but subject to certain events, which might prevent them taking estates tail and which would thus leave issue of the tenant for life not included, the same construction prevails: *Franks v. Price* (g); *Doe d. Rew v. Lucraft* (h); *Doe v. Gallini* (i). And lastly, which comes very near this case, where after the life estate to the father, remainders are given to sons in tail male, with remainder to daughters in tail general, and the testator having occasion to refer to the previous limitations of the estate, makes a gift to take effect on failure of issue of the tenant for life, there also the same general meaning is given to the word: *Banks v. Holme* (k); *Bristow v. Boothby* (l). The observations in the latter case strictly apply to that now before the Court, and its authority has never been shaken. The difficulty suggested for the plaintiffs of implying cross-remainders among any of the issue of John Baker's daughters, does not arise; for the object for which the defendants argue will be gained by simply giving the estate tail to John Baker in remainder. The only difficulty then remaining is, to cut down the estate given to the daughters of John Baker, from a fee-simple to an estate tail, so as to allow this limitation over to take effect. From John Baker being illegitimate, "heirs" of the daughters is necessarily reduced to nearly the same class as "heirs of their bodies," for their only other heirs could be brothers and sisters and their descendants; and the

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(a) 1 Eq. C. Abr. 185.

(b) 1 P. Wms. 754.

(c) 1 Ves. 24.

(d) 1 Eden, 86.

(e) 15 Ves. 564.

(f) 4 Russ. 283.

(g) 5 Bing. N. C. 37; S. C. 6 Sc. 710; S. C. 3 Beav. 82.

(h) 1 M. & Sc. 573.

(i) 3 Ad. & El. 340.

(k) 1 Russ. 394, n.

(l) 2 S. & St. 465.

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brothers and their descendants must have been exhausted under the prior limitations before the gift could take effect. It is not making a new will; for the word "heirs" may as naturally mean heirs in tail as heirs general. The word is so limited in many cases of ordinary occurrence, *ex. gr.*, in a devise to A and his heirs, and in default of A's issue, over; or in a devise to A, and then to his issue or the like and their heirs, and in default of A's issue, over: *King v. Burchall* (a); *Goodright v. Pullen* (b); *Lewis v. Waters* (c); *Doe d. Bean v. Halley* (d). In this last case a devise to one for life, remainder to his eldest son and his heirs, and for default of issue of the devisee for life, over, was held to give an estate tail only to the son, which is precisely what we contend for here. The argument that "heirs" is never thus limited, except when the testator intended to exclude some one who would take if the word was extended to mean heirs general, has no foundation, and is quite irreconcilable with *Doe v. Halley*. It is, therefore, only necessary to show that the testator probably so intended, and the word "heir" will be thus limited; and the same arguments for intention, on which we rely for the construction of the word "issue" in this will, define the meaning of this word also. The cases of *Ginger v. White* (e), *Goodright v. Dunham* (f) and *Malcolm v. Taylor* (g), depended on this, that the word "issue" in them must mean the same issue the testator had previously mentioned, as he could mean none others, having expressly included all the sons and daughters of the devisee for life. They therefore do not apply. A different rule of construction was also adopted in *Clonmert v. Whittaker* (h), which is an authority for us on both points in this case, as the gift there, "in case they died without issue," was held to give an estate tail to the parents, though the preceding limitation being a gift of "the estate," would carry the fee.

(a) 1 Eden, 424.

(c) 6 East, 237.

(e) Willes, 348.

(g) 2 R. & M., 416.

(b) 2 Ld. Raym. 1437.

(d) 8 T. R. 5.

(f) Doug. 264.

(h) 2 Jarm. on Wills, 374.

The LORD CHANCELLOR, in the course of the argument, referred to *Graves v Hicks* (a), and observed that it was decided in the same Court and a year after *Doe d. Gallini v. Gallini* (b); and *Blackborn v. Edgeley* was there cited, and not disapproved of, which could not have been the case if *Doe v. Gallini* had been considered as conflicting with it.

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In this case the question for the decision of the Court arises upon the will of Henry Baker. The testator, by his will bearing date the 26th of April 1821, after disposing of his personal property, devised his real estates in the following manner:—[His Lordship here stated the limitations of the will].—The devise to John Baker is to a natural son, and it is quite plain from the context and phraseology of the will that the testator was perfectly well aware of the results that flowed from the position of the devisee, and that neither John Baker himself or any of his issue could ever take as right heir to the testator. The plaintiff in this case is the heir-at-law of the testator (being the son of his only sister), and he now claims as on a failure of the limitations to John and his issue, John never having had any children. The defendant Sophia Baker, the widow and devisee of John Baker, claims under him, alleging that he took an estate tail, not directly displacing the limitations to his sons and daughters, but by way of remainder on failure of the prior limitations; and that, to effect this object, the estate in fee given to the daughters must be cut down to an estate in tail general. The defendant contends for this construction on the grounds that a general intention is manifested, as she insists, in the will, to provide for the issue of John Baker, and that if this intention is to prevail, the estate must pass through the entire line of the issue of John before it could go back to the testator's own right heirs; that the express limitations do not effect this object; that their effect is, in certain events, to defeat the ultimate remainder; and that, to remedy these defects, the construction

(a) 5 Ad. & El. 36.

(b) 3 Ad. & El. 340.

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contended for by her must be adopted. If the construction contended for by the defendant prevail, there is no doubt it will remove a great many difficulties which might otherwise arise; for it is quite true that, if I arrive at the conclusion that the intention of the testator was as stated, yet if the will cannot be construed as contended for by the defendant, the consequences would follow which have been noticed by her Counsel in argument. Thus, if there were no daughters, a daughter of a son of John Baker could not take in any event. Again, if John Baker married twice, and had a son by the first marriage, who should die leaving daughters, and a daughter by the second, who should die without issue, the daughters of the son of the first marriage could not have taken, because they would be only of the half-blood to the daughters of John; and in case of failure of the estate in tail male to John's sons, and a daughter taking the estate and dying without issue, the estate would not go to the right heirs of the testator, but would escheat to the Crown, or, if a trust estate, would vest in the trustee for his own benefit, according to the rule established in the case of *Burgess v. Wheate* (a). The construction contended for by the defendant's Counsel will remove all these difficulties, if it can prevail.

We may, I think, safely assume that in some event or other the testator intended that the estate should go back to his right heirs, and that he meant to accomplish this object by the limitations of the will. It is true that the devise to the right heirs is void as a devise, or rather was so when this will was made; but the case cited by Mr. *Fitzgerald, Nottingham v. Jennings* (b), shows that such a devise, as was stated in that case, may be sufficient to manifest the intent of the testator and aid the construction of the will. It is also, I think, plain on the face of the will, that the testator knew, what every man must be presumed to know, that by law none of the descendants of John Baker could take under the devise to his own right heirs; there is nothing, at all events, on the face of the will to show that he was under any mistake upon that subject. The question then is, what is the effect upon this will of the devise on failure of issue of John

(a) 1 Bl. Rep. 123.

(b) 1 P. Wms. 23.

Baker? It is not a devise on failure of issue of the daughters of John Baker, which would have cut down the estate given to them to an estate tail, as is clearly stated by Holt, C. J., in that case of *Nottingham v. Jennings*, and as is ruled in many cases.

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This is a question of intention. Let us take the most simple case of a devise to A and in default of his issue to B; it has long been settled that the devise which would *prima facie* have given but an estate for life to A, gives him an estate tail, to effectuate the intent deduced from the words of limitation over, that all his issue should take the estate before it could go to the devisee in remainder.

The next class of cases opens another question. They are, when, after the devise to the first taker, either generally or expressly for life, particular limitations are introduced in favour of his issue, followed by a limitation on failure of issue of the same person. If these particular limitations exhaust the entire line of issue in whose favour they are designed, without calling in aid any implication of a more general character to be deduced from the language of the limitation over, that limitation is to be considered as implying nothing more than has been expressed by the particular limitations which precede it; because the intention which it indicates has been already expressly and fully carried out. Such is the case of *Bamfield v. Popham* (a), reported in *Attorney-General v. Sutton* (b) and *Ginger v. White* (c).

But the ignorance and inaccuracies of testators too often present to the consideration of Courts of Justice cases requiring the application of a different principle, and numerous have been the instances in which they have been called on to determine on the effect of such general words of limitation in remainder, where the provisions already expressed do not appear to be consonant with the presumed intention; and hence has arisen the rule that the particular intent is to be disregarded in order to carry into effect the manifest general intent of the testator. This principle has been applied to one division of this class of cases more immediately applicable to the present

(a) Salk. 236.

(b) 1 P. Wms. 760.

(c) Willes, 348.

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case: that is, where in the enumeration of the lines of issue, the entire number of the same class, which the particular limitations indicate an intention of selecting, is left incomplete; there the general language of the limitation over has been laid hold of as indicating the general intention to include all of the class, and as controlling the particular limitations to a particular number. Such is the case of *Langley v. Baldwin* (a), where the testator devised to J. S. for life, and after his death to his first son in tail, and so to the sixth son, and then devised that if J. S. should die without issue male, the land should remain to J. B. The Court of Common Pleas certified that J. S. took an estate tail; and Raymond, C. J., observed on this case that an estate tail was raised by implication, because the express devise was not to all the sons; for if there had been more than six, and the six dead, must the heir-at-law have it before a seventh son? So also in *The Attorney-General v. Sutton* (b) the devise was to the testator's nephew (who was not his heir-at-law) for life, and afterwards to the first son or issue male of his body, and to the heirs male of the body of such first son; remainder to his nephew's second son and his issue male in tail; and then after the death of the nephew without issue male of his body the estate was limited over; and in this case, too, it was held by the House of Lords that the nephew took an estate tail. Again, in the case of *Stanley v. Lennard* (c), on a devise to Samuel the natural son of the testator for life, and after his death to his eldest son and his issue male, and for want of issue of Samuel then over, it was held that Samuel took an estate tail in remainder. Now, in these cases the intent of the testator was manifest to make provision for all the issue of the persons to whom express estates for life were given; but the enumeration did not comprehend the entire class, and the Court laid hold of the language expressing the event on which the limitation over was to arise, so as to include the whole line.

But that is not the case in the will which is now before me. Here the lines of issue are defined, within the range of the intention, so

(a) 1 Eq. Ca. Ab. 185.

(b) 1 P. Wms. 753; S. C. 2 Bro. P. C. 282.

(c) Amb. 355; S. C. 1 Eden, 87..

far as it is indicated by the particular limitations, the devises are complete ; all the sons of John Baker, with all the male descendants of the sons, are included in the first limitation ; all his daughters and their descendants are included in the second. I am now considering the case as if the devise to the daughters was what the defendant contends it should be, that is, conferring on them an estate tail.

Now, referring to the authorities, it cannot be denied that in this division of the general class of cases in which the supposed general intent, deducible from the limitation over, is apparently more comprehensive than the particular antecedent limitations would satisfy, but in which complete provision is made for all the members of the particular lines of issue which those antecedent limitations of themselves indicate an intention to provide for, the enlarged construction has not been given which has been applied to the class I have previously noticed. It has been considered that, instead of applying the general words of the limitation over to enlarge the provisions of the particular limitations and supply their defect, the latter are, in this second class, to contract the more general language of the limitation over and confine it to the lines of issue for whom express provision has been made ; that, in using general language, the testator is not of necessity to be supposed to intend to do more by implication than he had actually done by the express words he had used, and that, the express limitations being sufficient to include all the class of which express mention is made, they do not of themselves supply any ground for supposing the intention to have been more extensive, so that, in the absence of any evidence of intention to be deduced from those limitations, there is no foundation for giving a more enlarged meaning to the general words of the limitation over.

In other words, in both classes of cases the intention is deduced not from the words of the limitation over, but from those of the prior limitations ; in the one case, from their imperfection to accomplish what they show to have been the particular intent ; in the other, from their being adequate and sufficient for that purpose.

The earliest case on this head is that quoted from 2 *Dyer*, p. 171, *Turke v. Frencham*. The same case is also reported 1 *Anderson*, p. 8. In that case the devise was to Clement Frencham, and the heirs

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male of his body, and if it happened that he died without issue of his body, then over to Alexander Frencham; and it was held, that Clement Frencham took but an estate in tail male, which was not enlarged into an estate in tail general by the words of the limitation over, "but the first word in the will is the intent of the testator, which guides the subsequent words." And upon this principle proceeded the decision so much relied on at the Bar, in the case of *Blackborn v. Edgeley* (a). That was a case which very strongly resembled the present. There the testator devised his estates in trust to convey them to Hewer Edgeley for life, without waste, remainder to trustees to preserve contingent remainders, remainder to his (Hewer's) first and other sons in tail male, remainder to his daughters in tail general as tenants in common, with a jointuring power to Hewer Edgley; and if Hewer Edgley should die without issue, then the testator devised the estates over in fee to his cousins. Now, in that case, as in the case now before me, an argument was raised upon the effect of the terms of the limitation over; and it appears to me that the Court there collected the intention of the testator, not from the language of the limitation over, but from the words of the antecedent limitations; and there being no manifestation of an intention in the testator to comprehend every class of Hewer Edgeley's descendants, the Court did not put a larger construction on the latter limitation than the words themselves necessarily imported. There too, as here, it was argued that unless an estate tail was given to the first taker, his son's daughters would be excluded, but Lord Chancellor Parker said:—"As to what had been urged, that unless these words were to create an estate tail in Hewer Edgeley his son's daughters could not take, it did not appear the testator intended Hewer Edgeley's son's daughters should take, for he might think that on Hewer Edgeley's dying without issue male, his name and family would be determined; for which reason he might limit over to the daughters of Hewer Edgeley himself; besides, the son of Hewer Edgeley would be tenant in tail, and when of age might, by docking the entail, give the premises to his daughters."

(a) 1 P. Wms. 600.

The case of *Morse v. The Marquis of Ormonde* (a) has also been cited to the same effect; it does not, however, touch the principle so closely as *Blackborn v. Edgeley*, because in *Morse v. The Marquis of Ormonde* there were much stronger grounds for contending that the failure of issue there meant the issue before provided for than in the case of *Blackborn v. Edgeley*. In the report of the case of *Morse v. The Marquis of Ormonde* (b) much stress is not laid on the words of the codicil. I may also here refer to the case of *Graves v. Hicks* (c) cited in argument. That case is in affirmance of the principle of construction I have stated, and in accordance with the case of *Blackborn v. Edgeley*. In that case the devise was to the testator's grandson for life, with remainder to trustees to preserve contingent remainders, remainder to his first and every other son in tail male, and on failure of such issue remainder over. By a codicil the testator revoked several dispositions and devised the estate to his grandson and his heirs in strict entail as in his will directed, and on failure of issue of the grandson then over. The Court of King's Bench held that the grandson took a life estate only, and the Vice-Chancellor concurred in that decision. So far, the cases maintain the general proposition I have already referred to, namely, that in this class of cases the testator is not to be supposed to intend to do more by implication than he has done by express words. If it were the intention of the testator that the daughters of the sons should take estates, he might have secured that object by an express limitation, as readily and as naturally as he made the express limitation to the sons of sons.

The case of the defendant, however, is not pressed to the extent of seeking to destroy the intermediate limitations; but it is contended for her, that the general intention of the testator will be satisfied by giving an estate tail to John Baker after the limitations to the sons and their issue male. The case of *Doe d. Gallini v. Gallini* (d) has been relied on by her Counsel for this proposition, and on it they have mainly rested her claim. That was the case of a very complicated will, and it is quite manifest that the Court collected the

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(a) 5 Mad. 99; S. C. 1 Russ. 382.

(b) 1 Russ. 28.

(c) 5 Adol. & El. 38; S. C. 11 Sim. 536.

(d) 3 Adol. & El. 340.

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general intention of the testator, not from the simple words "in default of issue," but from all the particular limitations. In examining that case, it will be apparent that the intention of the testator was, that the estate should not go over as long as there was any stock of the testator, and that all his issue should be included in the limitations.—[His Lordship here read the limitations at length.]—These evidence a full intention that every line of the issue of the testator should take. The particular limitations, it will be observed, were, to a certain extent, imperfect, not providing for the children of children who might have died in the lifetime of particular issue, but the intent was manifest to provide for every line of issue. That brings the case within the range of *The Attorney-General v. Sutton*, and the cases of that class to which I have already alluded, where the particular limitations being incomplete to effect the intention which was indicated by them, the language of the limitation over was laid hold of to effect such general intent; and that in truth is the principle of the decision in *Doe d. Bean v. Halley (a)*, also relied on so strongly by the defendant. That case is not an authority for the proposition contended for by the defendant. It is one of plain intention to include all the male issue of Michael Halley, and it never could be contended that the testator meditated by issue only the eldest son and his heirs. That case stands on its own circumstances, and is no authority to cut down the estate in fee of the daughters in the present instance. Upon the whole of this case, whatever doubt or difficulty I might feel if the question was an open one, I am bound to say I think it is concluded by the authority of *Blackborn v. Edgeley*. That case has been decided more than a century since, and has never been overruled. I cannot therefore now disregard it; on the contrary, until a Court of Law shall overrule it, I feel myself bound to follow it.

I shall therefore hold that John Baker took but an estate for life, and that the defendant Sophia Baker can derive no interest in the lands as his devisee. At the same time, if she desire to have the opinion of a Court of Law upon the will, I shall direct a case for that purpose.

Reg. Lib. 96, fol. 319, 1847.

(a) 8 T. Rep. 5.

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May 1, 10.

THIS was an application on behalf of Archdeacon Magee, one of the defendants in this cause, that the enrolment of the decree bearing date the 3rd day of February 1847 might be opened; and that the said decree, and also the decree bearing date the 15th day of February 1846, and the report of the 15th day of December 1846, thereunder, might be set aside so far as regarded Mr. Magee, and that he might be at liberty to file his answer in the cause, upon his undertaking to do so within two days, and that the question of costs should be reserved until the hearing.

The enrolment of a final decree vacated, a decree *pro confesso* and report thereunder set aside, and the defendant allowed to answer under peculiar circumstances, the bill having been taken *pro confesso* after an interview with the plaintiffs' solicitor, by which the defendant swore he was deceived, and the decrees being plainly against his just rights.

The original bill in this cause was filed in the month of November 1829, against the defendants Byrnes, for the purpose of raising the amount of certain legacies and annuities bequeathed by the will of Thomas Byrne, and charged upon certain chattels real in the town of Wicklow, of which the testator died possessed. In 1833 a receiver was appointed over certain dwelling-houses, and amongst others over the premises called Mills's holding and premises in Coates's-lane. The former of these premises was let on a lease made to one Mills in 1811 for forty-one years at a rent of thirty guineas, which was shortly after reduced to twenty guineas, and which premises, and those in Coates's-lane, were in 1832 assigned by Mills to Archdeacon Magee, who held the former until the year 1845, when he assigned them, and the latter until 1840, when his interest therein determined.

Distinction between decrees on default and on the merits as to opening the enrolments of them.

It appeared that in 1829 the interest of the Byrnes in Mills's holding was sold under a writ of *fiery facias*, and purchased in trust for a Mrs. Dudgeon, to whom Mr. Magee from 1832 to 1845 regularly paid the rent of twenty guineas. Mr. Magee for the first time heard of the suit or the claims of the plaintiffs in the year 1834,

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when he was applied to by the receiver for the rent of the premises in Coates's-lane, £9. 4s. 7½d. per annum, which he paid him accordingly from that period until the determination of his interest; but no claim was ever made upon him for the rent of Mills's holding.

In the rental prepared in 1834, an observation appeared opposite Mills's holding, stating that "the defendants' interest in this house was sold under an execution;" and a consent was appended, signed by the parties in the cause, that the receiver should not be extended to Mills's holding or accountable for the rents of it; and it was accordingly omitted in the subsequent rentals; and in the account passed in February 1842, it was stated that Mr. Magee's interest in Coates's-lane had determined, and was not included in that account, nor would be in any future accounts.

In March 1845 the present bill was filed as an original and supplemental bill, making Mr. Magee a defendant; and stating that since the decree in the original cause in 1833, the plaintiffs had discovered that the testator was possessed of Mills's holding for a long term of years still unexpired, held at a rent of thirty guineas, and that the defendants demised it to Magee while the cause was pending; and that he was in possession of it and Coates's holding; and seeking to make him accountable for the rents of these two holdings. Mrs. Dudgeon was not made a party to the suit.

Mr. Magee having been served with a subpoena in the cause, waited on the plaintiffs' solicitor; the conversation which took place at that interview was differently represented in the affidavits of Mr. Magee and the solicitor, both of which are adverted to in the judgment of the Lord Chancellor; but the result was, that Mr. Magee, conceiving he had no real interest or concern in the suit, and was merely a formal party, employed no solicitor, and suffered the bill to be taken *pro confesso* against him. The Master, by his report under this decree, there being no appearance for Mr. Magee, charged him with the rent of Mills's holding from the 25th of March 1828, to the 29th of September 1846, at the rate of thirty guineas per annum, amounting to £585. 15s., and with the rent of the premises in Coates's-lane from the 25th of March 1840, to the 29th of September 1846, at the rate of £9. 4s. 7½d. per annum. The summons to

take the Master's directions and a notice of the filing of the charge were left at Mr. Magee's residence, during his absence in England, and on his return he found them; but considering them merely formal, he destroyed them. On the 22nd of March 1847, he was served personally with a copy of the final decree, by which he was required to lodge £642. 15s., the arrears with which he was so charged.

The plaintiffs' solicitor stated in his affidavit, amongst other matters, that the defendant Magee held Mills's premises at a rent of thirty guineas a-year; and also alleged that the bill was not prepared from any deeds or documents in the plaintiffs' possession, who were ignorant of their interests; and that at the time of filing the bill he was wholly ignorant of the rental and consent of 1834.

Mr. *William Smith*, for Mr. Magee, contended that the Court has a discretionary power in relation to vacating the enrolment of decrees, though that discretion is to be regulated by precedent and authority; and that power was recognised by the House of Lords in *Sherry v. Lord Muskerry* (a); that this discretion will be exercised when the merits of the cause were not discussed before the decree was pronounced, as in the present case, where the bill was taken *pro confesso*; or where there has been surprise, or the party has been misled by conversations, as here: *Stevens v. Guffy* (b); *Enraght v. Fitzgerald* (c); or where, as here, it is essential to justice: *McCartney v. O'Neil* (d). He referred to the English practice, 1 *Dan. Ch. Prac.* p. 481, 2nd ed., as to circumstances under which a defendant will be allowed to answer the bill, upon the Court permitting the enrolment to be vacated; and also cited *Gort v. Blennerhassett* (e); *Balgrey v. Chorley* (f); and *Wardle v. Carter* (g).

The *Attorney-General* and Mr. *V. Scully*, for the plaintiffs, insisted that this was not a case in which the Court would open

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(a) Ll. & G. *temp.* Pl. 575.

(b) 1 Tur. & Russ. 178.

(c) 4 Ir. Eq. Rep. 276.

(d) 5 Ir. Eq. Rep. 160.

(e) 3 L. R. 152.

(f) 1 My. & K. 640.

(g) 1 My. & Craig, 283.

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the enrolment, its discretion being always exercised with great caution, and only in cases of fraud or surprise: *Barnes v. Wilson* (a); that neither of these were established, as the allegations of Mr. Magee, who had full notice, were contradicted by the plaintiffs' solicitor; that the merits of the cause will not be entertained on such a motion, even when the decree was one upon default: *Pickett v. Loggon* (b); there must be such conduct as will amount to *mala fides*; and if the party be under a misapprehension, from the conduct or observations of the opposite side, it will not be a ground for vacating the enrolment: *Barnes v. Wilson*; *Balgrey v. Chorley* (c). They also cited *Blake v. Kirwan* (d); *Sheppard v. Murdock* (e); *Harlow v. Phips* (f).

Mr. William Smith replied.

THE LORD CHANCELLOR.

May 10.
Judgment.

In this case an application is made under extraordinary circumstances by Archdeacon Magee, one of the defendants, to open the enrolment of the decree of the 3rd of February 1847, in this cause, and that the report made the 15th of December 1846 may be set aside so far as regards him, and that he may be at liberty to file an answer. The bill in the supplemental cause was filed in the year 1845, of which fact Mr. Magee had distinct notice, having been served with a notice and subpœna to appear and answer upon the 14th of November 1845, by Mr. Geraghty the plaintiffs' solicitor. To this bill none of the defendants appeared, and a decree *pro confesso* was pronounced on the 12th of February 1846, entitling the plaintiffs to the benefit of a former decree, and directing accounts to be taken, and also an account of the rents alleged to have been received by the defendant Magee out of certain premises in the town of Wicklow, or which, without wilful default, he might have received. Under this decree the Master proceeded to take the accounts directed,

(a) 1 Russ. & My. 486.
 (c) 1 My. & Kee. 640.
 (e) 1 Mol. 130.

(b) 5 Ves. 702.
 (d) 4 L. R. 210.
 (f) Glas. 109.

and a summons was duly served upon Mr. Magee, who, however, did not attend in the office, and the Master made his report on the 15th of December 1846, whereby the defendant Magee was charged with the sum of £642. 15s. on foot of the rents of the premises. This report was confirmed, and by the decree of the 3rd of February 1847, the plaintiffs' demands were decreed well charged on the rents of the said premises, and upon the said sum of £642. 15s. reported due by Mr. Magee, and which sum he was thereby ordered to bring in and lodge in Court to the credit of the cause. This decree has been enrolled, and against it Mr. Magee now complains.

The first ground of complaint put forward by Mr. Magee is, that he was misled by the plaintiffs' solicitor. He states that, in a day or two after he was served with the subpoena, he waited on the solicitor, who informed him that as he (Magee) had no interest in the suit his name would be struck out of the bill and that he need not give himself any further trouble about the matter, and led him to believe that he was a mere formal party against whom no substantial relief was sought. The solicitor for the plaintiff has made an affidavit in which he denies the substance of that conversation as detailed by Mr. Magee, and alleges that he stated it was intended by the bill to make him accountable for the rent of the premises, and that if he had any defence to make he ought to employ a solicitor; and further, that he did not give him to understand that his name would be struck out of the bill or that he was a mere formal party. So far therefore as relates to Mr. Magee's having been misled by the plaintiffs' solicitor, I cannot found any decision on it, as the statement is merely of a parol conversation which is denied on the other side. It does, however, appear to me very plain that Mr. Magee must have laboured under some misapprehension respecting the nature of the suit and the manner and extent in which it was sought to affect him; for he had notice of all the proceedings, and it is impossible to account for his conduct except on the supposition of his really being under an erroneous impression. At the same time, it would be a strong measure to deprive parties of their rights acquired under a decree of the Court, when others, who are interested and made parties with full

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notice, will not contest the suit; and I should therefore have been disposed to leave Mr. Magee to his remedy by a bill of review, or such other proceedings as he might be able to take, had I not really found, upon examination, that the decree made against him is an unjustifiable one, and that if it is to stand he will be wrongfully deprived of a large sum of money. It is necessary to go into a detail of the proceedings in order to see this.

The original bill was filed in November 1829, by females claiming certain legacies and annuities bequeathed by the will of Thomas Byrne, charged upon certain chattels real in the town of Wicklow; it sets forth the property and the will of the testator; that the executrix assented to the specific bequests; that the sons of the testator went into possession of the premises; it charges that they permitted themselves to be evicted of part; and it prays an account of the chattels real and assets of which the testator died possessed, and (what is important in the present case) an injunction against disposing of the premises. A receiver was appointed in the cause over the premises in 1833. The present bill is supplemental to the former, and the present proceedings are more or less connected with it. It turns out that Mr. Magee is made answerable in respect of two sets of holdings, one called Mills's holding, the other, premises in Coates's-lane. Mills's holding is mentioned in the rental furnished to the receiver in the original cause in 1834, and is set out as the holding No. 1, let at a yearly rent of £31. 10s.; but there is this observation annexed to it:—"The defendants' interest in this house was sold by the Sheriff under execution;" and to this rental is appended a consent by the parties in the cause that "the receiver shall not be accountable for any part or parts of the rents and profits of the several houses or holdings marked Nos. 1, 2 and 3;" and so matters went on in accordance with that arrangement. I find also in another account the receiver makes the following observations:—"The interest of the lessor, the said James Byrne, was, about the year 1831, sold by the Sheriff under an execution issued against the said James Byrne at the suit of a Mrs. Dudgeon, and was purchased up by the said John Mills in trust, as it is supposed, for said Mrs.

Dudgeon, which afterwards became vested in Archdeacon Magee, who now pays the said rent of twenty guineas to the said Mrs. Dudgeon." In 1838 the interest of the parties in the other premises, except two, are stated to have been evicted, and the observations in the rental of 1841 are: "The interests of the parties in the holdings of Matthew Pluck, Archdeacon Magee, representatives of Abraham Mills and Christopher Dudgeon, having terminated, same are not included in this account, nor will in any future accounts."

The circumstances under which Mr. Magee is now made liable are certainly very extraordinary; he is found indebted for the arrears of the rent of thirty guineas a-year, not as having ever paid that rent to the receiver in the cause, but on the mere allegation of his being the tenant of some of the Byrnes; and he is further made responsible for the rent of Coates's holding, for which he ceased to be liable upon the giving up of those premises in 1840 to the head landlord, up to which time he had paid the rent of them to the receiver, and by this means he is in the report charged with a sum of over £600. Now, in order to show how far the plaintiffs in this cause were mistaken as to their rights, the bill filed in March 1845, after stating the original bill and the appointment of a receiver in that cause, proceeds thus:—"Your suppliants show that the interest in four of the holdings over which the said receiver was appointed expired in the year 1838, and that there remained but two holdings yielding yearly rents amounting to £30 or thereabouts." One of those holdings of which the interest had expired (although not given up to the head landlord until 1840) was the holding in Coates's-lane, at £9. 4s. 7½d. per annum; and yet the report in this cause finds Mr. Magee owing nine or ten years' rent although the tenure had expired. Again, the plaintiffs in this bill state that they have lately, since the decree in the original cause, discovered that the testator was possessed of a dwelling-house and concerns in Wicklow, for a long term of years still unexpired, and that the Byrnes, or some of them, took upon them to demise the same to John Mills, at a fine of £100 and a yearly rent of £31. 10s., and that the Byrnes, or some of them, pending the proceedings, assigned the same to the defendant Magee. Now, before the insti-

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tution of this suit the plaintiffs had full notice that the testator Byrne had an interest in these premises, but that it had been sold under an execution against Thomas and James Byrne, and that the receiver was, by a consent in the cause, relieved from the necessity of looking after the rent of them. This bill is taken *pro confesso* against Mr. Magee, and a report is made charging him with these rents. Mr. Geraghty, the plaintiffs' solicitor, has made an affidavit, and going beyond what related to himself in the transaction addresses himself to the case of Mr. Magee. Mr. Magee's case is simply this:—"I purchased the interest of the tenant Mills in 1832; I paid the rent reserved—not to the receiver in the cause, but—to the person who had purchased the lessor's interest, until I assigned my own interest in 1845." Mr. Geraghty's affidavit however states, contrary to the allegations in the bill, that Mr. Magee held as tenant, subject to the rent of £31. 10s., and not as the purchaser of Byrne's interest; and it appears evident that this bill has been framed on conjecture and inaccurate information, without instituting a proper scrutiny into the pleadings in the former cause.

Had Mr. Magee rested his case merely on his own acts, or rather negligence, I should have found great difficulty in giving him the relief which he now seeks; but when I find the manner in which the proceedings in this cause have been conducted, so as to effect a gross fraud (though I do not mean to impute intentional or moral fraud) upon Mr. Magee, I am prepared in this instance to open the enrolment of the decree. At the same time, it is not a light matter to open a decree enrolled, nor is such a thing to be done for the mere asking. I have looked into all the authorities on the subject, and though some of the earlier ones are not to be followed, still I do not think that my hands are tied up in such a case as this. I find a distinction is established between decrees pronounced on the merits of the case and upon full hearing, and those had on default. In the former class the Court will not open the enrolment of a decree; but where the decree has been taken upon the default of the opposite party, I am not afraid to do so in order to arrive at the real justice of the case.

In the case of *Kemp v. Squire* (a) two earlier instances were cited to Lord Hardwicke, in which the enrolments of decrees were opened. In one, that of *Robson v. Cranwel* (b), the decree was on default, the solicitor for the plaintiff not employing Counsel. In the other case—*Benson v. Vernon* (c)—the bill was taken *pro confesso* in the Exchequer in Ireland, which Court, upon application, thought it beyond its power to deprive the party of the enrolled decree; but upon appeal to the House of Lords in England, the enrolment was set aside, as the merits of the case had not been discussed. Lord Hardwicke, in alluding to this case, says:—"It was objected that the Court of Exchequer in Ireland could not do it, but that it required a superior Court, the House of Lords. I am unwilling to give in to that notion; for a Court holding plea by error or appeal is to judge by the same rules as the inferior Court from whence it comes, the rules of law and equity being the same here as in the House of Lords." "But these precedents," he continues, "prove it to be discretionary in the Court (I do not mean arbitrarily so) to exercise this power, if they see fit, and there are sufficient circumstances in this case to induce the Court to do it, but on payment of the costs of the decrees." The same distinction between a decree on the merits and one by default is recognised by Lord Eldon in the case of *Charman v. Charman* (d), where, after observing that it was admitted at both sides that the merits of the case had been fully gone into at the Rolls, he says:—"Although it was true that at law a judgment by default might be set aside, yet there was no instance where a judgment had been set aside on motion, when the merits had been gone into." Those cases establish the distinction I have mentioned between decrees on the merits and by default. I may further observe, that by the 91st of the General Orders of the Court of Chancery of England, of the 8th of May 1845, it was ordered that where the decree is not absolute, if the defendant has a case of merits not appearing on the bill, he may apply to the Court by petition for leave to answer, and the Court being satisfied

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(a) 1 Ves. sen. 205.

(b) 1 Dick. 61.

(c) 3 Bro. P. C. 626.

(d) 16 Ves. 115.

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that the case is proper to be submitted to the judgment of the Court, may, on such terms as seem just, vacate the enrolment of the decree and permit the defendant to answer. These rules cannot of course govern this case ; but they show the caution and discretion with which the Court will act in opening the enrolment of a decree.

It being manifest upon the whole of this case that Mr. Magee misunderstood the real nature of the suit so far as he was concerned, and that the plaintiffs' solicitor did not by letter or writing distinctly inform him of the nature of the claim made against him, I feel justified, under such extraordinary circumstances and seeing that the whole of the demerits of the plaintiffs' case appear on the affidavit of their solicitor, in opening the enrolment of this decree ; and at the same time, I think the peculiarity of the circumstances will guard against this case being made a precedent. I will open the enrolment, set aside the decrees and report, and allow Mr. Magee to put in his answer ; but he must pay the costs of the decree and enrolment, and all the costs since the subpoena, so far as the suit relates to himself, together with the costs of this application, though I am sorry to be obliged to make him pay them under the circumstances.

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May 22.

The original decree, pronounced before the General Orders of 1843, contained no directions to take an account of subsequent incumbrances.

A decree on a bill of supplement and revivor, made in 1846, also omitted to direct such an account. The Court refused to amend the latter decree under the 103rd General Order by adding the direction, as it is not a matter of form.

Quære, whether the 102nd General Order applies to supplemental suits ?

THIS was an application on behalf of the plaintiff, pursuant to the prayer of the petition, that the decree made in this cause, and bearing date the 22nd of December 1846, might be corrected pursuant to the 103rd General Order, by adding thereto a direction to the Master in the cause to report all debts and incumbrances affecting

the lands and premises in the pleadings mentioned, subsequent as well as prior to or contemporaneous with the plaintiff's demand, as should be proved under the decree.

It was an incumbrancer's suit. The decree in the original cause against a defendant, since deceased, was pronounced in the year 1833, previous to the rule requiring a direction to take an account of incumbrances subsequent to the plaintiff's demand, and therefore contained no such direction. The suit was revived, and the present decree was pronounced on the 22nd of December 1846. It simply directed that the decree of 1833 should be carried into execution against the heir-at-law and personal representative of the debtor, and omitted to direct the account of subsequent incumbrances pursuant to the 102nd General Order. The omission was sworn to be accidental.

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Mr. *Gayer* moved the prayer of the petition, and contended that the omission was a "clerical error," or at least a "mistake arising from an accidental slip," as this part of the account is in practice added as a usual direction by the officer in making out the decree.

Argument.

Mr. *Woodroffe*, contra, argued that an account of subsequent incumbrances in this case would not have been a matter of course; that it was not within the 102nd Order; and that at all events it was a separate and substantive portion of relief, and the 103rd Rule only authorises amendments requisite for completing some part of what has been decreed, and does not extend to introducing an entirely new direction: *Whitehead v. North* (a); *Tisdall v. Lawler* (b).

THE LORD CHANCELLOR.

If this direction was a matter of course which the Registrar was bound to put into the decree, it might be within the rule. But the Registrar informs me that it is not a part of the decree which he is obliged to insert as a matter of course, without a special direction. In a suit like this, all the Court can do is, to put the parties in the

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(a) Cr. & Ph. 78.

(b) 1 Con. & Law. 392.

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same condition as if the original suit had been framed in the same form. It is doubtful whether the rule referred to (a) applies at all to supplemental suits; and it may be a question, whether even on a re-hearing you would be entitled to this direction. You must therefore choose whether you will re-hear the cause. It is for your consideration whether it is worth your while to do so. The 102nd Rule applies to suits before pending, for it applies to all suits; and it may be that when a supplemental suit is heard, the Court will give the same directions as if it was an original suit.

I cannot grant this application, but I will give no costs.

(a) 102nd General Order.

LEECH *v.* LAW.

May 25.

Where the report of the Master, under an order to take preliminary accounts under the 36th General Order is excepted to, the exceptions are to be brought before the Rolls, and not set down to be heard before the Lord Chancellor.

THE bill in this case was filed by the plaintiff as a mortgagee against the assignees of the mortgagor Joseph Beale (who subsequently became a bankrupt) and one Richard Garrett, who also claimed on foot of a prior legal mortgage of the year 1837, which was never registered, and of a prior equitable mortgage. An order was made by the Master of the Rolls on the 7th of February 1847, upon consent, for a reference to the Master to take the preliminary accounts under the 36th General Order, by which his Honor reserved all further directions and costs until the return of the Master's report.

A variety of complicated questions having arisen in the Master's office, especially between the assignees and Garrett, several exceptions were taken to the Master's report, and the cause was now set down to be heard upon the report and exceptions.

Mr. *Brewster*, Mr. *Christian* and Mr. *F. W. Walske*, for the defendant Garrett.

Mr. Bartholomew Lloyd, for the plaintiff.

Mr. Berwick, *Mr. George* and *Mr. William Darley*, for the assignees.

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These exceptions should not have been set down as a cause. *Judgment.*
The report was made upon an order of reference to take preliminary accounts in the cause under the 36th General Order. If the party seek to object to that report, the proper course is to do so by motion to set aside or vary it. This is the consequence of taking short cuts. I have clearly nothing to do with this matter. The order was made by the Master of the Rolls, and his Honor has reserved the consideration of it for himself. The defendant, if he quarrels with the report, must go to the Rolls. These accounts, however, appear to me to be such as should have been taken under a decree to account upon bill and answer, and were not properly the subject of preliminary accounts under the 36th General Order. I will hear the cause on pleadings and proofs, and make a decretal order to account, and then the Master can make up his report, and the defendant, if he thinks proper, can take his exceptions to that report; and afterwards the defendant can bring those exceptions regularly before the Court.

Reg. Lib. 97, fol. 68, 1847.

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Chancery.

Oct. 26, 27.
1849.
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A devise of lands to A for life, subject to all the testator's just debts, legacies and funeral expenses, with a bequest of his personal property to A, the better to enable her to pay his debts, &c., does not prevent a judgment debt of the testator from being barred by the 40th section of statute 3 & 4 W. 4, c. 27, or create a trust for the creditor within the 25th section.

The distinction between charges on lands and trusts for debts considered, and the several cases on their effect in reference to the Statute of Limitations reviewed.

Counsel for an incumbrancer, whose charge is stated in the bill, but not proved in the cause, will not be heard against the plaintiff's rights.

STEPHEN BLAKE the elder being seised in fee of the lands of Crumlin and of Cloncun in the county of Galway, in the year 1796 executed a mortgage in fee of those lands amongst others to Joseph Callanan, to secure the sum of £1000 lent by him to Stephen Blake; and concurrently with the mortgage Stephen Blake and his brother Robert Blake executed their joint and several bond with warrant of attorney in the penal sum of £2000, as a collateral security, upon which separate judgments were entered in Trinity Term 1796. The judgment against Robert Blake was duly redocketed in Michaelmas Term 1833.

In Trinity Term 1808 one John Montgomery obtained a judgment for £400 against Stephen Blake, which was assigned to Joseph Callanan in September 1819.

Stephen Blake the elder died in 1813, leaving his brother Robert Blake his heir-at-law, who thereupon entered into possession of the real estates of Stephen, including the mortgaged premises.

Robert Blake died in the month of February 1819, having, by his will, executed on the 22nd of May 1818, amongst other dispositions made the following:—"And whereas I am seised in fee of the lands of Cloncun, situate in the barony of Ballymore, in the county of Galway aforesaid, and possessed of a freehold estate in the lands of Grange, by virtue of a lease of three lives, two of which are still in being, under Colonel Giles Eyre; I give, devise, and bequeath my said estates of Cloncun and Grange, with all rights, privileges, appendances and appurtenances thereunto belonging or in any wise appertaining, unto my sister-in-law Mrs. Jane Blake otherwise Eyre, for and during the term of her natural life, subject to all my just debts, legacies and funeral expenses; and after her death to such of her children, in such proportions as she, by any deed or will by her duly executed, shall limit, direct, or appoint; and for want of

such appointment," he devised the estate to the children, except one, share and share alike. The testator then gave several legacies of small amounts, and concluded his will as follows:—"Lastly, I give and bequeath all my personal property of every nature and kind whatsoever unto my sister-in-law Mrs. Jane Blake, the better to enable her to pay my debts, legacies and funeral expenses;" and he appointed her his executrix in conjunction with two executors. Mrs. J. Blake proved the will.

By indenture of the 28th of October 1819, Mrs. Jane Blake appointed to her second son Stephen Blake (one of the defendants) and his heirs all her right, title and interest, under the will of Robert Blake, in the lands of Cloncum and Grange, from and after her decease; and by that deed Stephen Blake covenanted to indemnify her from all charges affecting said lands, and particularly from the said mortgage debt and judgment collateral thereto.

By the marriage settlement of Stephen Blake, executed on the 4th of December 1819, Mrs. Jane Blake and Stephen Blake appointed and conveyed the lands of Cloncum and Grange, subject, amongst other things, to Mrs. Jane Blake's life estate and the trusts of the will of Robert Blake, to the use of Stephen Blake for life, remainder to the use of his first and other sons successively in tail male. There was issue of this marriage Stephen Blake junior, and several other children, all minors.

Giles Eyre Blake, the heir-at-law of Stephen Blake the elder and of Robert Blake, died in 1842, leaving Peter Blake his eldest son and heir-at-law.

The interest of Joseph Callanan in the mortgage and judgments becoming vested in Lorenzo Dundas and Ellen his wife. They filed their bill on the 8th of January 1846, against Stephen Blake, his wife, and eldest son Stephen, and against Peter Blake, the heir-at-law of Stephen the elder and of Robert Blake. It prayed amongst other things, that the will of Robert Blake might be established and the trusts thereof carried into execution, and for an account of what was due on foot of the mortgages and the judgments of 1796 and 1808, and for a sale of the lands of Cloncum

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(the interest in Grange having determined), for the payment of the sums found due to the plaintiffs.

The defendants, amongst other defences, relied on the Statute of Limitations. Peter Blake also relied on an actual entry on the lands by his father Giles Eyre Blake in 1819, claiming to be entitled adversely to the will of Robert Blake, and a continued possession thereunder.

The principal question raised at the hearing of the cause was, whether, by the terms of the will of Robert Blake, a trust was created for the payment of debts which had the effect of preventing the operation of the Statute of Limitations, 3 & 4 *W.* 4, c. 27.

Argument. Mr. *Greene*, Mr. *Hickey* and Mr. *Dundas*, for the plaintiffs.

They contended that the words of the will of Robert Blake amounted to a charge of his debts on the land, and were equivalent to a direction to sell the land for payment of them; that the will therefore created an express trust which affected the land in the hands of the trustees under the 25th section of the 3 & 4 *W.* 4, c. 27, and was not barred by the lapse of twenty years: *Dillon v. Cruise* (a); *Jones v. Scott* (b); *Hunt v. Bateman* (c); *Young v. Wilton* (d); *Francis v. Grover* (e); *Commissioners of Donations v. Wybrants* (f); *Bailey v. Ekins* (g); *Shaw v. Borrer* (h); *Hargraves v. Mitchell* (i); *Fergus v. Gore* (k); *Crallan v. Oulton* (l); that upon the true construction of the will the devisees took no beneficial interest until the debts were paid, and that the case therefore fell directly within the authority of *Hunt v. Bateman*.

Mr. *P. Blake*, for Grome, a mortgagee of Peter Blake, contended he was entitled to be heard, inasmuch as, though he had not proved his mortgage, yet it was stated in the bill.

(a) 3 *Ir. Eq. Rep.* 70.

(c) 10 *Ir. Eq. Rep.* 363.

(e) 5 *Hare* 39.

(g) 7 *Ves.* 319.

(i) 6 *Mad.* 326.

(b) On Appeal, 4 *Cl. & Fin.* 383.

(d) 10 *Ir. Eq. Rep.* 18.

(f) 7 *Ir. Eq. Rep.* 580.

(h) 1 *Keen*, 577.

(k) 1 *Sch. & Lef.* 107.

(l) 3 *Beav.* 1.

The LORD CHANCELLOR ruled, that as the mortgage was not proved, Counsel for Grome was not entitled to be heard.

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The *Attorney-General*, Mr. *F. Fitzgerald* and Mr. *Meagher*, for the defendant Peter Blake.

They contended that the defendant Peter Blake had, from the year 1819 until the present time, held these lands adversely to the will and to the trusts of it; that the rights of the plaintiffs against him were not the same as against those in remainder, because he claimed by title paramount to those in remainder; and that when the Statute of Limitations in the 40th section enacts that a charge shall be barred by the lapse of twenty years, it does not except charges created by will.

Mr. *Brewster* and Mr. *David Boyle*, for the defendants Stephen Blake and wife, and Stephen Blake the younger.

They relied on the words of the 40th section as barring all charges, and contended that as the statute itself did not make any exception in favour of trusts, this Court will not do so: *Knox v. Kelly* (a); *Young v. Wilton* (b); that the 25th section of the statute, by expressly excepting trusts from the operation of the former sections, which are conversant with land, and not excepting them from the operation of the latter sections relating to charges upon land, indicates clearly that trusts falling within the 40th section were barred by the lapse of twenty years. They also insisted that if this were not so, the distinction taken from *Bailey v. Ekins* down to *Hunt v. Bateman* was, that where the devisee takes a beneficial interest subject to a charge, lapse of time will be a bar as between the devisee and the incumbrancer, although when he takes as a trustee no time will be a bar between him and his *cestui que trust*.

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The plaintiffs Lorenzo and Ellen Dundas seek relief as creditors of Robert Blake. The bill is filed to establish the will of Robert

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(a) 6 Ir. Eq. Rep. 279.

(b) 10 Ir. Eq. Rep. 18.

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Blake against Peter Blake and other parties. It prays an account of the sum due on foot of a mortgage of 1796 and judgments of 1796 and 1808. It appears that in 1796 Stephen Blake, the brother of Robert, was seised in fee of the lands of Cloncum. They were mortgaged to Joseph Callanan for £1000, and at the same time a joint and several bond, with warrant of attorney, was given by Stephen Blake the mortgagor, and by Robert, on whose will the question in the cause arises. On this bond separate judgments were entered in Trinity Term 1796. The mortgage given by Stephen and the judgment against him are admittedly barred; but this collateral judgment against Robert, which was redocketed, is the first demand on which the plaintiffs insist. There is a second judgment of 1808. It is not a judgment against Robert Blake, but against Stephen. It is not made *ex directo* a ground of claim out of Robert's estate, but it is relied on thus:—Robert became seised of assets of Stephen, who thus became a creditor whose debt was due at the time of Robert's will, and is argued to be within the trusts of it.

These are the facts raising the question. The deductions of title are perfectly clear, and I need not refer to them. The parties to the record as defendants are of two classes; persons claiming under the will of Robert, and persons claiming under titles adverse to that.

It is admitted that by the lapse of time the mortgage of 1796 is barred under the 40th section of the Act 3 & 4 W. 4, c. 27. By the same Act and the Redocketing Act the judgment against Stephen Blake is also barred.

The case then rests, as to this demand, on the judgment of 1796 against Robert Blake, which was redocketed in 1833, and it is not, even as to this, contended that as upon a judgment the plaintiffs can have any relief. They claim the execution of the trusts of the will of Robert Blake, and contend that under those trusts they are entitled to payment of their judgment, as a debt due by him at the time of his making this will and at his death. In respect of the judgment of 1808, which is vested in the plaintiffs, and was a judgment against Stephen Blake, they do not claim direct relief on the ground of that judgment being in itself comprised within the

trusts of Robert's will; but they allege that Robert, who survived Stephen and was his heir-at-law, became a debtor to the real assets of Stephen, and that this debt can be raised under the same trusts of Robert's will and so made available for the discharge of this demand against Stephen. The rights of the plaintiffs depend therefore wholly on the will of Robert Blake, and on the equity, if any, which they can rely on by virtue of that will, so far as the same may be now available, notwithstanding the statute for the limitation of actions and suits relating to real property.

The defendants are the persons now claiming the estate which the plaintiffs contend is liable to their demands under the devises contained in that will. The tenant for life named in it, Mrs. Jane Blake, is dead. Those now representing the remainder are the children of her son Stephen Blake. Another defendant Peter Blake stands in a peculiar position. He is the heir-at-law of Giles Eyre Blake, who was the heir-at-law of Stephen Blake the elder and of Robert Blake. He claims a title adverse to the will of Robert Blake and to all the persons claiming under it; and he has gone into evidence to show an actual entry made by his father on the death of Robert Blake, nearly thirty years since, making this adverse claim. His rights, if well founded, would exclude the title of the plaintiffs altogether; and it is obvious that there is a question still to be tried as between him and the other defendants, the children of Stephen Blake. The plaintiffs, as against this defendant, have relied on various proceedings at the instance of creditors of Stephen Blake the elder and of Robert Blake, under which receivers were appointed over the estates shortly after the death of Robert Blake; and a question is made on the effect of these proceedings as taking the possession of the estate from Giles Eyre Blake, or at least as preventing him, or the defendant Stephen who represents him, from relying on that possession under the Statute of Limitations. If it were admitted that the plaintiffs could now sustain this suit as against the devisees of Robert Blake, serious questions would remain to be discussed as regards the position of the defendant Peter; questions which might be difficult of solution in this suit as it is constituted, and which possibly might require to be adjusted in another tribunal before the plaintiffs on this record could make any claim.

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But the first question, and that which formed the topic of the principal arguments at the Bar, is whether the plaintiffs can now, on this bill filed in the year 1846, make any claim against the estate in question, even supposing the devisees under Robert Blake's will had, ever since his death in 1819, continued in undisputed possession under that will. The important parts of that will are as follows:—"And whereas also I am seised in fee of the lands of Cloncum, and possessed of a freehold estate in the lands of Grange by virtue of a lease for three lives, I give, devise and bequeath my said estates of Cloncum and Grange, with all the rights, privileges, appendances and appurtenances thereto belonging or in anywise appertaining, unto my sister-in-law Mrs. Jane Blake, otherwise Eyre, for and during the term of her natural life, subject to all my just debts, legacies and funeral expenses; and after her death to such of her children in such proportions as she by any deed or will, by her duly executed, shall limit, direct or appoint; and for want of such appointment, I order and direct that the issues and profits arising therefrom may be divided, share and share alike, amongst all her children, male and female, save only Mrs. Mills, who has been already provided for by her father." He then gives some small legacies, and adds—"Lastly, I give and bequeath all my personal property, of every nature and kind whatsoever, unto my sister-in-law Mrs. Jane Blake, the better to enable her to pay all my debts, legacies and funeral expenses;" and he then appoints her and the Rev. Robert Marsh and Paul Dolphin, executrix and executors.

It is urged on behalf of the plaintiffs that, by this will, the debts of the testator are charged upon the land, and no doubt they are so; and it is further argued that a trust is created for the payment of them; that the devisees, though beneficially entitled, have this trust cast upon them; that they are, in consequence, trustees for the payment of these debts; and that, under these circumstances, the debts thus charged are not within the limitation of the 40th section of the 3 & 4 W. 4, c. 27; or if they are, that the case is one between trustee and *cestui que trust*, and the plaintiffs are entitled to the benefit of the provisions of the 25th section of the Act.

Although many cases have not occurred on the construction of

the Act in question, in reference to trusts for the payment of debts, those which have been decided have apparently given rise to some difficulties when it is attempted to reconcile them with each other, or to reconcile some of them with the words of the Act.

Prima facie the case before me is within the simple words of the 40th section. The plaintiffs say they are entitled to relief in this cause, because the debts are by the will charged upon or payable out of the land. The section, however, applies to all sums of money charged upon or payable out of any land. A present right to receive the amount accrued over twenty years before the commencement of this suit to a person capable of giving a discharge for or release of it, and no part of the principal money or interest has been paid, nor has any acknowledgment of the right to it been given within that period in the manner contemplated by the section of the Act.

Again, *prima facie* the demand is not within the 25th section of the Act. It is a mere pecuniary demand, and therefore not a demand for any land or rent vested in a trustee, and which the *cestui que trust* could be entitled to receive from him as land or rent.

But when we are to consider the cases I have alluded to, it would seem not sufficient to test the application of the Act to any particular state of facts by the plain words of its enactments. Other considerations are called in aid and have given rise to distinctions under which it is contended here that the plaintiffs are entitled to recover; and they insist accordingly that the charge upon the lands is to be considered as creating a trust for payment of the debts, and that as such it is either without the operation of the 40th section, or within the protection of the 25th.

That before the statute such a charge had the effect of taking debts out of the operation of earlier Statutes of Limitation was long established, and it is unnecessary to refer to authorities in support of that position; but the operation of that doctrine of a Court of Equity was to bring the debt out of the condition of a demand affected by the earlier statutes into that of a right as against which, as the law then stood, no statutable limitation was in force—it converted the debt, which might be barred by statute, into a

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charge on the estate, which could not. But the statute I am now considering does not profess to deal with the debt as such or save as it is or may be a charge upon the land, and applies for the first time to charges upon land an express limitation of time. It would appear from this consideration that decisions before the statute, the import of which was that a debt was saved from the bar of the old Statutes of Limitation by a devise such as that before me, because it had thereby become charged on the land, can have little or no application to the question now arising on a statute which is expressly directed to the limitation of that class of securities within which those decisions determined that the antecedent debt became comprised by means of the devise. The creditor before the statute acquired the right of a person having a charge upon the land. The question is, can he, notwithstanding this statute, now lay claim to more? The 40th section of the statute contains no exception in his favour. Does the policy of it afford any reason for a distinction? On the contrary, it would seem that an Act whose principle and policy it is to discourage and to bar stale demands—to relieve the possessors of property from such claims, even when the precise amount of them and the particular claimants were ascertained or even specified in the instrument of charge, would *a fortiori* be called for and deemed applicable in the case of a general charge of debts unascertained in favour of creditors unknown.

There being, then, nothing in the words of the Act giving an express exception to this class of cases, nothing, as it appears to me, in its policy to require that they should be excluded from its restrictions, and the plain words of the Act appearing, *prima facie* at least, to embrace them, it remains to consider how far, on the authority of decided cases or on any recognised principles of a Court of Equity, the plaintiffs can sustain their present demand. In this part of the case I am relieved from a great deal of the embarrassment which the earlier decisions on the Act appeared to give rise to, by the recent decision of the Court of Exchequer in the case of *Hunt v. Bateman*. It is very material to mention the facts of that case, the decision of the Court and the judgments of the learned Barons by whom it was decided; because it is only

from the occurrence of the special provisions of the will on the effect of which it proceeded that the case falls short of being one which might have been judicially binding on the present case. In fact, in their exposition of the law, the learned Judges express opinions which I think will warrant me in saying that, if the present case was before them for decision they would hold the plaintiffs' demand to be absolutely barred. That case is reported in the 10th volume of the *Irish Equity Reports* (a); and the substance of it as stated in the marginal note is this:—"Where a testator in the introductory part of his will directs that all his just debts shall be paid, and then devises his lands, subject to that payment, to trustees to convey, &c., a trust is created by the will for the payment of debts, the lands being vested in the trustees to raise their amount by the execution of a trust; and the right of a judgment creditor is not affected by the 40th section of the 3 & 4 W. 4, c. 27, or if it be, it is taken out of that section by the saving of the 25th section." The will in that case was in the following terms:—

[His Lordship then stated the will as set out in p.p. 363, 364, of the report of *Hunt v. Bateman*.]

After the testator's death a judgment creditor filed a bill for the administration of his estates; a receiver was appointed over the lands, which were ultimately sold under the decree in the cause. A surplus fund remaining in Court, a reference was obtained by a judgment creditor of 1810, and the Remembrancer found that, under the will the judgment was not barred by the Statute of Limitations; and on exceptions to that report the cause was heard. The Chief Baron, in his judgment, after stating the facts, says:—"That question involves two considerations; first, whether when money is secured upon land by means of an express trust for its payment, the Statute of Limitations bars the claim to the money so long as the trust is subsisting? secondly, whether in this case such a trust was created by the will of the Rev. Henry Bateman in favour of his creditors? and if so, whether that trust was subsisting at the time of the sale by which this fund was realised?" He then pro-

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(a) 10 Ir. Eq. Rep. 363.

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ceeds to observe that, if the first question were not closed by authority, he would find it difficult to hold that, where an estate is devised or conveyed upon trust to raise and pay a sum of money, that money is not (within the meaning of the 40th section) money "charged upon, or payable out of land," or that it was within the saving of the 25th section. Considering, however, that question as concluded, and after referring to the various cases upon the subject, he then proceeds thus:—"The next question then is, whether, between the persons entitled to the debt and the person representing the estate devised by the testator to the persons named as trustees in the will, the relation of *cestui que trust* and trustee subsisted when the sale was completed, by which this fund was realised?" He then observes on the will, and comes to the opinion that the legal estate was devised to the devisees expressly as trustees, and that therefore the case was not affected by the decisions in *Hughes v. Kelly*, *Harrison v. Duignan* and *Francis v. Grover*; and finally decides that there was a trust created by the terms of the will for the payment of the testator's debts, and that the creditor's right was not barred by the Statute of Limitations, concluding thus:—"In reference to some points which were pressed in argument, it may be well to add that we concur in the decisions of *Harrison v. Duignan*, *Hughes v. Kelly*, and *Francis v. Grover*, ruling that a charge and a devise to a person for his own benefit subject to that charge are not enough, without more, to create a trust for debts which prevents the bar of the Statute of Limitations; and our judgment in this case involves no assent to the proposition that, if the right of the trustee to the estate devised to him in trust were barred by the Statute of Limitations, the *cestui que trust* of the charge could successfully rely upon the trust, for the purpose of recovering it out of the lands." Baron Pennefather, in p. 380, thus defines the principle:—"The principle which appears to me to be extracted from those cases seems to be this:—That charges upon lands in the hands of the beneficial owner of the estate are not within the meaning of the exception in that statute; and that, whether charged by a deed or by a will; and that the remedy in such cases must be pursued within the time and under the pro-

visions set forth in the 40th section; but, that where lands are conveyed to trustees on express trust, either expressly declared in a deed or in a will, or else stated in such language that by the rules of construction put on that language by Courts of Equity the legal estate is vested in the trustees and the beneficial estate or possession in another, the trustees hold subject to those trusts specified in that instrument, and the latter case falls within the exception, not in the Act of Parliament itself, but the exception engrafted on it." The case of *Hunt v. Bateman* appears therefore to have been decided expressly on the ground that the estate was vested in trustees and that on the whole construction of the will the payment of the debts was part of the trusts to be performed.

In all the cases in England and in those before Sir E. Sugden, where the demand was held not barred, there were, as in the case of *Hunt v. Bateman*, trustees having an estate separate from the beneficial interest in the land, and that estate was not barred, and therefore it was unnecessary to consider the 25th section. This was the case in *Young v. Lord Waterpark* (a), and in *Blair v. Nugent* (b), and *The Commissioners of Charitable Donations v. Wybrants* (c). This last case was clearly within the 25th section, because it was a case of an annuity devised to the trustees on express trusts, and annuities, by the interpretation clause of the Act, are declared to be comprised in the word "rents." The case of *Ward v. Arch* (d) is to the same effect.

Admitting then the decision in *Hunt v. Bateman* on the facts of that case, and with the limitations which it establishes, I have next to consider the state of the authorities as regards the more general question involved in the present case. It may, in the first place, be said of the case of *Hunt v. Bateman* itself that the great pains taken by the Court to rest its decision on the peculiar language of the will show that they intimated no such opinion as that in all cases of a general charge of debts on an estate beneficially devised and without the intervention of trustees the statute would have no operation.

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(a) 15 Law Jour. 63; S. C. 10 Jur. 1.

(b) 9 Ir. Eq. Rep. 400.

(c) 7 Ir. Eq. Rep. 580; S. C. 2 Jo. & L. 182.

(d) 12 Sim. 472.

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But on this point the Court has no room for inference: the contrary is expressly declared, and the judgment of the Court is, I may almost say, rested on the special facts of that case as entitling the claimant to that relief which on such a general charge he could not obtain. One case only appears to have occurred in England where the effect of the statute on a charge or trust for the payment of debts came in question. I refer to the case of *St. John v. Boughton* (a). In that case the Vice-Chancellor says:—"The debts in question are charged upon or payable out of land, and therefore it seems to me that they are within the 3 & 4 W. 4, c. 27. No part of the fruit or produce of the land was severed or set apart for payment of the debts." If that case had been decided on this ground against the creditor, it would have been a strong authority; for it arose, not as here on a charge of the debts upon the estate, but on a devise to trustees on express trust to sell and pay them. The Counsel appear to have acquiesced in the construction of the Act as thrown out by the Court; but they sustained the demand on other grounds by proving an acknowledgment made by the trustees within twenty years. So far therefore that case may be said to want the authority of an express decision resting on the construction suggested by the Vice-Chancellor; but in all other respects it constitutes a judicial declaration of his opinion in its favour.

The first case in which this question appears to have been noticed in Ireland is that of *Kelly v. Kelly*, before Sir Michael O'Loughlen when Master of the Rolls, reported in the 6th volume of the *Law Recorder* (b). From that case it would appear that Sir Michael O'Loughlen was of a different opinion from that of the Vice-Chancellor in *St. John v. Boughton*—for he assigned, as the ground of his decision, that the trust for payment of debts excepted the judgment from the operation of the statute; though he also decided that there had been in fact a sufficient payment within twenty years to exclude it from the general provisions of the 40th section; and besides, there had been before the Act a decree for carrying the trusts of the will into execution. In point of authority, therefore, that case undoubt-

(a) 9 Sim. 219.

(b) 6 Law Rec. N. S. 222.

edly stands in contradiction to that of *St. John v. Boughton*; but in considering its weight it is important to observe that the Master of the Rolls in deciding it rests his judgment on the cases of *Jones v. Scott* and *Phillipo v. Munnings*, of which the former was afterwards overruled by the House of Lords and neither directly involved the consideration of this question. So far the question would remain unaffected by any preponderating weight of authority.

The case of *Dillon v. Cruise* (a), before Lord Plunket, is another authority which is much relied on on this part of the case in support of the plaintiffs' claims, and the general proposition stated in the marginal note of it, if unexplained, would directly sustain their claims and entitle them to a decree. That general proposition is, that where a trust is created for the payment of debts, the right of the creditor to the benefit of that trust is not affected by the 40th section of 3 & 4 W. 4, c. 27. But in considering that case, some important parts of it are to be mentioned. The testator by his will left his property, freehold and chattels real, to his wife and five children and their heirs, executors and administrators, to be divided share and share alike between them, subject however to the payment of his just debts, *which he directed to be paid in the first instance*, and directed that his personal property should be divided in like manner between his wife and children *after payment of his debts*, and he appointed three executors. Lord Plunket in his judgment observes forcibly on this language, as showing that there was an express trust for the payment of the debts, and that the devisees could take nothing beneficially until those debts were paid. "I think it important," he says in p. 79, "to the decision of this case to consider the terms of the will of Joseph Cruise, the conuzor of this judgment, as in my opinion they afford ground for deciding this case without entering into the question of the construction of the Statute of Limitations, which has been so much discussed in the argument." He then states the devises and directions of the will, upon which he thus observes:—"It is not merely the ordinary case of a party devising his property subject to his debts, but the testator

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 Judgment.

(a) 3 Ir. Eq. Rep. 70.

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here gives precise and special directions with respect to the payment of them, and devises in such form as to impose upon the devisees the obligation of making the actual payment of them before they can derive any benefit from his property." And again, in p. 83, he observes :—" Now here there is an express trust for the payment of debts, not resting merely on those cases which decide that a devise of lands subject to the payment of debts, or a devise charged with the payment of debts, creates an express trust in the consideration of a Court of Equity ; but here there is an express devise, upon the condition of paying the debts, to parties who are to take no benefit from that devise until the debts are paid, and there is a direction to have the property applied in payment of those debts in the first instance." There were, besides, other circumstances : the property had been in the care of the Court by a receiver, in a suit instituted by the executors for the administration of the real and personal estate ; and the question respected, not the estate itself in the hands of the devisees, but a surplus of the produce of it remaining after a sale had in a foreclosure cause, to which that receiver had been extended.

But the cases of *Kelly v. Kelly* and *Dillon v. Cruise* cannot be passed over without referring to the judgment of the present Chief Justice of the Court of Queen's Bench, when Master of the Rolls, in the case of *Knox v. Kelly (a)*. That was the case of a legacy charged on land, which he held to be barred by the operation of the Act, although it affected the land by way of trust ; and it is impossible to read his able and convincing judgment, without seeing that he entertains no light doubts of the soundness of the general proposition supposed to be sustained by the cases of *Kelly v. Kelly* and *Dillon v. Cruise*. He says it is plain that, except through means of a trust, no legacy can be charged on real estate ; and he says it will be difficult, if not impossible, to establish any substantial distinction between debts and legacies in reference to the operation of the statute ; but he holds, notwithstanding, that it was impossible to decide the case on those grounds against the

(a) 6 Ir. Eq. Rep. 299.

plain and unambiguous words of the 40th section; and having referred to the case of *Lord St. John v. Boughton*, he says he cannot consider the question before him as settled by the opinions expressed in *Kelly v. Kelly* and *Dillon v. Cruise*. Returning then to the latest case on the subject, the case of *Hunt v. Bateman*, I find the proposition plainly and distinctly declared in the words of Baron Pennefather, which I have already quoted; and I cannot say, after the review of the other cases which I have taken, that there is any clear unequivocal decision which shows that opinion to be erroneous.

Looking to the language of this will, I find that the words in which the charge is imposed deserve consideration in reference to some other recent authorities. It is only said, that the testator devises the lands to his sister-in-law, subject to the payment of his debts, legacies and funeral expenses; and in the case at least of a particular charge, it has been decided that this form of expression will not constitute the grantee or devisee of land a trustee for the person entitled to the charge. That was so held in *Harrison v. Duignan*, *Hughes v. Kelly* and *Francis v. Grover*. In *Harrison v. Duignan* (a) lands were conveyed "subject to" an annuity previously created by the vendor, and the purchaser covenanted to indemnify him against it, yet Sir E. Sugden held that no trust was created by this in favour of the annuitant. He says, p. 304, "On the part of the plaintiffs it is argued, that the effect of the deed of conveyance was to create a trust in favour of Roger Kyne (the annuitant). I am clearly of opinion that there was no trust created. There was an obligation imposed on the purchaser, which this Court would enforce." *Hughes v. Kelly* (b) was also the case of a deed. By it, lands were conveyed by a father to his son, subject to the payment of £1000 to his sisters in certain proportions, and the son covenanted to pay them; and Sir Edward Sugden held there also that, although an obligation was imposed, no trust was created. And in each of these cases he held that the demand constituted merely a charge, in respect of which not more than six

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(a) 2 Dr. & War. 295

(b) 3 Dr. & War. 483.
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years' interest could be recovered; that is, that although a remedy lay in equity to enforce the charge against the lands, there was not such a relation of trustee and *cestui que trust* created between the owner of the charge and the grantee of the lands as would take the case out of the operation of the 42nd section of the Act.

Francis v. Grover (a) is more strictly applicable to this case, as it arose upon a will whereby the charge was created and the estate devised subject to it. The devise was to trustees, but merely to uses, and the question was, whether the beneficial devisee, the lands being devised "subject to the payment of the annuities thereinbefore bequeathed," was liable to pay more than six years' arrears of these annuities? The will expressly charged them on the land—not as here, only by implication from the words "subject to"—yet the Vice-Chancellor held that the devisee was not so liable; that he was not a trustee for the annuitant within the 25th section of the statute or otherwise, and consequently that it was the case of a mere charge in respect of which no more than six years' arrears could be recovered. He says (in p. 49), "The present case is one of land devised to a person, not upon trust, but subject to and chargeable with an annuity, and the question is, whether the beneficial owner of an estate charged with the payment of an annuity under a will is a direct trustee, so that the annuitant, though making no claim for twenty years, can afterwards claim the whole arrears? If there be a devise to trustees in trust to pay an annuity, and no purchase for value intervening, the 25th section will govern the case. But this is a devise of land to a person beneficially, subject to a charge." The Vice-Chancellor then proceeds to reason upon the 42nd section, and thus concludes:—"My opinion is, that neither upon principle nor authority can this be considered as a case of express trust within the Act, as between the plaintiffs and defendants. Where an annuity is given by will, and the real estate of the testator is charged with the payment of it, and then the estate is simply devised, charged with the payment of the annuity, my opinion is, that that is not a case of express trust."

Now, unless there is some distinction between a general charge

(a) 5 Hare, 39.

of debts or a devise subject to the payment of debts, and a devise subject to the payment of a specific sum or annuity, the case of *Francis v. Grover* decides the question here. In *Hunt v. Bateman* the Chief Baron observes (p. 371), with another view :—"In *Young v. Lord Waterpark* and in *Blair v. Nugent* the trust was to secure a specific sum, or portions of a specific sum, of money. If such a trust be exempted from the enactment which bars, after a certain lapse of time without payment or acknowledgment, "money charged upon or payable out of land," it appears to me impossible to hold that a similar exemption does not exist to a trust of land for the payment of the debts generally of a settlor or testator. Whether the money made "payable out of land" is specified by a statement of monies numbered in the deed or will or is so described as to be capable of clear ascertainment, is immaterial to the question whether or not it is within the legislation of the 40th section of the statute or within the saving of the 25th section. In each case it is money; in each case it is made payable out of land; in each case it must be treated as within or without the operation of the Act, for reasons affecting all money made payable out of land by means of a trust, upon which the land is conveyed or devised expressly to secure it. The cases of *Young v. Lord Waterpark* and *Blair v. Nugent* therefore appear to me to be direct authorities for holding that if the will in the case now before us created a trust for creditors which was subsisting at the time of the sale, the present claimant's debt was not barred by the Statute of Limitations."

If, according to this view, a trust for payment of debts is to be treated in the same way as a trust for the payment of a specific sum, where, on the whole frame of the will, such a trust is created as will, as in the case of *Hunt v. Bateman*, take the case out of the operation of the statute, the same reasoning, one would think, ought to apply where, on the principle of construction acted on in the case of *Francis v. Grover*, no such trust is created. If the mode of charging does not create a trust for a specific sum, why should it have a larger operation in favour of a general charge of many undefined sums? The Chief Baron manifestly takes this view of the effect of the cases which I have been referring to, when, at the

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conclusion of his judgment, he expresses the concurrence of the Court in the decisions of *Harrison v. Duignan*, *Hughes v. Kelly* and *Francis v. Grover*, which I have already quoted. The last sentence of that judgment bears on the case of the defendant Peter Blake, as to which I do not think it necessary to make any further observation. I may also refer to *Gough v. Andrews* (a) on the meaning of the words "subject to" being, generally speaking, rather words of recognition than of charge.

Upon charges for the payment of debts, as distinguished from one for the payment of a specific sum of money, or an annuity, it is, no doubt, to be observed that Courts of Equity have given to such charges peculiar force; and the word "trust" has been, in the common phraseology of the Court, applied to such charges, without much or any distinction as to the terms by which they have been created, or attaching any very precise meaning to the word itself when so applied. The object of the Court has been to carry out and effectuate the object of the testator and to secure the performance of those purposes to which he desires to dedicate his estate. To this end the Court gives its aid by enforcing the charge as a trust, by taking an account of the objects for which that trust was designed, and by decreeing a sale of the estate for its performance and satisfaction; it, as it were, makes itself the trustee, and compels the beneficial owner to yield up his estate to its disposal. It goes further, it holds that taking an estate so charged,* the beneficial owner can put himself, if he wish, into the position of a trustee for the creditors; can sell the estate as such for the discharge of the debts, and make a title to a purchaser without rendering the latter liable to see to the application of the purchase-money. For this I may refer to the cases of *Ball v. Harris* (b); *Baily v. Ekins* (c); *Elliott v. Merryman* (d); *Dolton v. Hewen* (e). But all this is done in aid, not in consequence, of the will—to effectuate the intention by giving effect to the charge; in other words, the Court gives its aid and affords these remedies, not for the purpose of creating a trust in putting on the beneficial owner

(a) 1 Col. C. C. 71.

(b) 4 My. & Cr. 264.

(c) 7 Ves. 319.

(d) Barnard. 78.

(e) 6 Mad. 9.

the character of a trustee, but as the mode in which, by its peculiar machinery and directions, it can make substantially operative the charge created by the will. The charge retains its original character: it is a charge and nothing more. A Court of Equity enforces the obligation of that charge by means of its jurisdiction for the enforcement of trusts, by holding that all charges on land are within that jurisdiction, and by supporting on the same principle the sale of the estate as an act done by the beneficial owner in discharge of the obligation cast upon it by the charge which, if he were expressly named a trustee, it would sanction and approve, and which it is necessary to uphold for the very purpose of making the charge effective. The observations of Baron Lefroy, in giving judgment in the case of *Hunt v. Bateman*, support this view. He says (p. 383), "In my opinion the fact of charging a sum of money on land neither creates an express trust within the meaning of this Act, nor, if it did, would a bill to raise it come within the provisions of the 25th section respecting express trusts. The distinction between an express trust and an implied trust has been long and well established; and it does not appear to me that the cases or *dicta* which have been cited to show that a charge of this sort creates an express trust warrant any such position; on the contrary, they appear to me to show the opposite." Sir Edward Sugden says (a), the trust arises by construction of Equity. The Master of the Rolls, in *Knox v. Kelly* says, "It is plain that except through the means of a trust no legacy can be charged on real estate." In *Dolton v. Hewen* all that was held was, that the devise conferred a power of sale as distinguished from the fee, so as to relieve the purchaser from the liability to see to the application of the purchase-money.

In *Burke v. Jones* (b) and in *Morse v. Langham*, cited in that case (p. 286), express trusts were created; in the one by a devise to trustees for the purpose; in the other by a direction to the devisee to pay the debts. In the *Commissioners of Charitable Donations v. Wybrants* (c) Sir Edward Sugden takes care to guard himself

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 Judgment.

(a) 3 Ven. & Pur. 160.

(b) 2 Ves. & Bea. 275.

(c) 2 Jo. & Lat. 191; S. C. 7 Ir. Eq. Rep. 580.

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against the notion that such a charge as this would make the devisee a trustee. His judgment in *The Attorney-General v. Persse* is cited as containing these words:—"The charge is of itself a trust, like the common and ordinary case of a charge of debts, which in the view of the Court creates a trust for their payment." He says, "I did not use these words in the sense you put on them. I did not decide, that if an estate be devised to A subject to an annuity to B, A is a trustee for B." I may also refer to the last sentence of his judgment in that case as supporting the same view, and as in entire conformity with *Francis v. Grover*:—"It is not a case in which the annuities were given to trustees for the charities, and the estate itself subject to the annuities is given to other persons beneficially. If that case should arise, it may be found more difficult to relieve the charities in this Court, when time has operated against the trustees of the annuities as a legal bar."

Looking to these considerations, I cannot find any satisfactory authority for the position, that a devise to a party intended to take beneficially, subject to the debts of the deviser, without more, constitutes that description of trust which would warrant me in holding that, as between the creditors and the devisee, the relation of *cestui que trust* and trustee is so established as to except the charge from the operation of the 40th section of the 3 & 4 W. 4, c. 27. Whatever may be my own opinion as to the question, whether in the case of a clear and express trust for a definite sum of money the demand is properly within the 25th section of the Act, I do not think it necessary to go into that question; it may, I apprehend, be found that the position that it is has been rather too strongly inferred by some of the Members of the Court of Exchequer in the judgment in *Hunt v. Bateman*, as settled by authority against the plain words of the enactment.

The words of the will of Robert Blake, in which he gives his personal estate to his sister-in-law, the better to enable her to pay his debts, legacies and funeral expenses, have been relied on in aid of the construction contended for by the plaintiffs. There is perhaps some ambiguity about the meaning of this clause; but I think the true reading of it is, that he gives to her this personal estate, not as

making her a trustee of it in place of his executors, but beneficially, in aid of the liabilities and obligations he had cast upon her by the charge. It might be urged not unreasonably as showing that (as was contended here by the defendants) if any trustee was appointed or any trust created by the will for payment of the debts, the devise in that respect was limited to the life estate of Mrs. Blake; it is the better to enable *her* to pay the debts, and could not be available in the same way after her decease, because the personal estate and the real estate devised might then go in different channels.

The argument, that because a charge creates a trust in the contemplation of a Court of Equity therefore the statute does not apply, and the arguments founded on the nature of a charge for payment of debts, go altogether too far. They must, if sustainable at all in the view propounded by the plaintiffs, go the length of establishing, that in no case could a charge on land created by devise be barred by the 40th section of the Act. This view is forcibly and conclusively urged by the Master of the Rolls in his judgment in *Knox v. Kelly*, applying to the case of a legacy; and I agree with him, that it is impossible to distinguish between the cases.

On all these grounds I think I am well sustained both on principle and authority in deciding as I do, that there is no such trust created by the will of Robert Blake as entitles the plaintiffs to maintain this suit, against the bar of the statute.

It is obviously unnecessary in this view of the case to go into the question which occurred in the course of the cause, as to the admissibility of evidence which was offered to show that the debt was subsisting at the date of Robert Blake's will, or to consider whether, strictly speaking, the debt of 1796 could be considered as his debt within the meaning of the devise; and, as I have already observed, it is equally unnecessary to consider more particularly the special defence of the defendant Peter Blake.

The bill must be dismissed, with costs against the defendant Peter Blake, but without costs as to the other defendants.

Reg. Lib. 100, fol. 352, 1849.

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Judgment.

1848.

Rolls.

Ex parte HUTTON,

In the Matter of the Act to facilitate the Sale of Incumbered Estates
in Ireland.

Nov. 4, 26.

Dec. 16.

1849.

Jan. 12.

(In the Rolls.)

The decree in a suit by B, a puisne mortgagee, directed that he should redeem A, a prior mortgagee, who had the title-deeds, within six months, or in default, that the bill should be dismissed, with costs, against A; that the defendants who ought to do so should pay B the sum found due to her, and the sum directed to be paid by her to A, provided she should have paid same, and in default thereof, a sale to pay B and the other reported creditors in their priority, and the sum which she should pay to A. A was not paid off, and after the six months had elapsed, and the suit stood dismissed with costs as against him, he presented a petition for a sale under the Incumbered Estates Act. *Held*, that as A had possession of the title-deeds, and as the Court had no jurisdiction to order him to lodge the deeds, no sale could be had under the decree, and therefore there was no pending suit within the 67th section of the Act.

THE petition in this matter was presented under the Act to facilitate the Sale of Incumbered Estates, 11 & 12 Vic. c. 48.

The petition stated a mortgage of the 1st of November 1833, whereby Richard Young, who was seised in fee of the lands of Drumgoon, and other lands in Cavan, and Margaret Young his wife, and Luke Magrath, conveyed the said lands to Robert Hutton, subject to redemption on payment of £20,000; the death of Luke Magrath in 1834, after having devised his interest in the mortgaged lands to Margaret Young; and a mortgage of the equity of redemption by Richard and Margaret Young, executed on the 1st of February 1835, in consideration of a further advance of £6000 to Richard Young.

The petition then stated that there was due to the petitioner on foot of the first mortgage, for principal and interest, the sum of £26,175, and on foot of the second mortgage £6300.

The petition further stated the proceedings in a suit for foreclosure and sale, instituted by Christiana Powell Leslie on foot of a mortgage of the 1st of February 1838, and a decree pronounced therein on the 12th of June 1844, whereby an account of the sum due to the petitioner on foot of the mortgages was directed, and it was decreed that Mrs. Leslie should pay the sum found due to him, together with his costs, within six months after the Master

Held also, that the Court had authority to stay B's suit.

Form of decree and practice in Ireland in a suit by a puisne creditor for redemption and sale.

Form of order on petition of a first incumbrance under the Act.

should have made his report; and in default of payment, that the bill should be dismissed with costs against the petitioner.

The petition then stated, that the Master made his report on the 19th of November 1847, finding that the sum of £31,346. 0s. 1½d. was due to the petitioner, and that a final decree was pronounced on the 19th of January 1848, directing a sale of the lands, and that the bill should be dismissed with costs against the petitioner in the event of Mrs. Leslie not redeeming within six months from the date of the report. The material parts of this decree are more fully stated in the judgment.

The petition further stated, that the six months so allowed for redeeming expired on the 19th of May 1848, without Mrs. Leslie having redeemed the land from the petitioner's mortgage, and that accordingly the bill then stood dismissed against the petitioner.

The petition also stated the incumbrances affecting the property sought to be sold, and that the petitioner was the first incumbrancer and had possession of the title deeds.

Mr. *Hutton* moved on the petition, when—

Nov. 4.

The MASTER OF THE ROLLS objected to the petition, on the ground that the consent of the parties in *Leslie v. Young* had not been obtained, and allowed the matter to stand over in order that the consent might be obtained.

Argument.

A consent was accordingly entered into, bearing date the 17th of November 1848, signed by the solicitors for the plaintiff in *Leslie v. Young*, but not by the persons representing the inheritance, by which Mrs. Leslie consented that all proceedings in that suit should be stayed, and that the petitioner Robert Hutton should be at liberty forthwith to proceed, as the Court might direct, to a sale of the lands.

Mr. *Hutton*, in support of the petition, contended that the suit in *Leslie v. Young* having been dismissed on the 19th of May 1848, in

Nov. 26.

1848.
Rolls.
Ex parte
HUTTON.
Statement.

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Rolls.
Ex parte
 HUTTON.
 ———
Argument.

consequence of the plaintiff not having redeemed the petitioner's mortgage, was not a "pending suit for redemption, foreclosure or sale," within the meaning of the 67th section. The decree was inoperative, and no sale could be had under it, as the Court would not sell an equity of redemption, according to the practice established in this country.

As to costs; the plaintiff was only entitled to them in the event of a sale, which could not now be effected.

Mr. *Butt*, for the plaintiff in *Leslie v. Young*, stated that he was willing to consent to the staying of that suit if her costs were provided for. But the consent was only signed by the plaintiff and not by the other parties to the suit, and was therefore insufficient to give the Court power to proceed with the petition within the provisions of the 67th section, which required "the consent of the parties competent to consent to the staying or dismissal of the suit."

Dec. 16. The matter was again mentioned, when—

Mr. *Hutton* again argued that the consent of the parties was not necessary, as the suit was not a pending suit. The bill having been dismissed against the petitioner, the lands could not be sold subject to his mortgage: *Lawless v. Mansfield* (a); *Kirwan v. Lord Portarlington* (b); *Steele v. Philips* (c); *Rolleston v. Morton* (d); *Tremble v. Simpson* (e); *Kieran v. Corr* (f).

The English authorities, in which the contrary had been held, were not applicable to this country. He also contended that the suit of *Leslie v. Young* was defective for want of parties, and therefore that the petitioner could have no relief in it.

Mr. *Butt* insisted that the suit in *Leslie v. Young* was still

(a) 4 Ir. Eq. Rep. 113.

(c) 1 Hog. 49.

(e) 6 Ir. Eq. Rep. 98.

(b) 8 Ir. Eq. Rep. 593.

(d) 4 Ir. Eq. Rep. 149.

(f) Ir. Jur. 9.

pending, as no final order dismissing it had been pronounced, and the receiver had not been removed.

1848.

*Rolls.**Ex parte*
HUTTON.*Argument.*

Mr. *Norman*, for the inheritors, objected to their estate being burdened with double costs; and contended that an effectual sale could be had in *Leslie v. Young*; *Carlton v. Farlar* (a); *Kieran v. Corr* (b).

Mr. *Hutton* replied.

The MASTER OF THE ROLLS observed, that if the practice here was the same as in England, there would be no difficulty; for if the plaintiff in a bill for foreclosure and redemption did not redeem within the time specified by the decree, though the bill was dismissed generally, a final order was necessary: *Dan. Ch. Pr.* p. 989, 2nd ed., and no final order having been made, the suit of *Leslie v. Young* was still pending. If the decree in *Leslie v. Young* was framed according to the precedents usual in this country, it would seem that there might be a sale, although the bill had been dismissed against Mr. Hutton. There was a conflict of authority as to whether there could be a sale subject to a mortgage. In *Seton on Decrees*, p. 120, there was a precedent of a decree made by the Lords Commissioners in 1782, in which the sale of an equity of redemption had been directed. With respect to the objection that the suit of *Leslie v. Young* was defective, his Honor said that the question, under the 67th section of the Incumbered Estates Act was, whether there was a pending suit, and not whether that suit was valid; otherwise the Court, in every petition matter under the Act, if it appeared that there had been a decree in a pending suit, would have to re-hear the cause if it was objected that the suit was defective.

The MASTER OF THE ROLLS.

A petition has been brought before the Court in this matter, under the Incumbered Estates Act, which raises a question as to the

1849.

Jan. 13.

Judgment.

(a) 8 Beav. 525.

(b) *Ubi sup.*

1849.

*Rolls.**Ex parte*
HUTTON.*Judgment.*

course of proceeding in the Court of Chancery in a suit for redemption and sale. The facts are these :—Mr. Robert Hutton presented a petition under the said Act, for the sale of certain lands which were mortgaged to him on the 1st of November 1833, by a Mr. Richard Young and others. Mr. Robert Hutton states that he is the first incumbrancer, and also that he has the title-deeds, and in either character he is entitled to present a petition under the 2nd section of the Incumbered Estates Act, unless prevented by the provisions of the 67th section of the said Act. That section, amongst other matters, provides that the Act shall not authorise the presenting any petition for sale in any case where at the time of presenting such petition any suit for foreclosure, redemption, or sale of the incumbered land, which shall have been commenced before the 1st of July 1848, shall be pending, unless with the consent of the parties competent to the dismissal or staying of the suit, and certain powers are given to the Court as to staying such suits.

The first question which arises is, whether there is a pending suit within the meaning of the 67th section of the Act? The facts as to the alleged pending suit are as follow :—a Mrs. Leslie, being a puisne incumbrancer on the land mortgaged to Mr. Robert Hutton, filed a bill to redeem him, and to sell the lands to pay off her own incumbrance, and the sum which she should pay to Mr. Robert Hutton; and on the 19th of January 1848, a final decree was pronounced by the Commissioners for hearing causes in the Court of Chancery. That decree, so far as it is material to state it, orders and directs that the plaintiff Mrs. Leslie should pay to the defendant Mr. Robert Hutton, within six calendar months from the 19th of November 1847 (being the date of the Master's report) the sum of £31,346. 0s. 1½d., the sum found due to Mr. Hutton by the said report, and that thereupon Mr. Robert Hutton should convey to the said Mrs. Leslie; and in default of payment by Mrs. Leslie of said sum, with interest and costs, within said time, it was further ordered that Mrs. Leslie's bill should stand dismissed with costs "as against the defendant Robert Hutton." The decree then orders that the defendants, or such of them as ought to do so, do, within six calendar months from the date of the decree (*i. e.* from the 19th

of January 1848), pay to the plaintiff Mrs. Leslie £5,856. 2s. 2d., found due to the said Mrs. Leslie, with interest, and the costs of the suit; and do also, within the time aforesaid, pay to the said Mrs. Leslie the plaintiff the sum directed to be paid by her to Mr. Robert Hutton, "provided the said plaintiff shall have then paid same;" and in default thereof the Master is directed to sell the lands, and that out of the produce of the sale, &c., the plaintiff and the other persons whose demands are found due to them by the said report be paid the same in the priority reported, and that the plaintiff be paid in like manner the sum which she shall pay to the said defendant Robert Hutton. The decree then directs the payment of the plaintiff's costs, in the same priority with her demand, and also the costs which she would pay to Hutton, in the same priority with his demand. Then follow some further directions as to costs, not material to the question which arises; and it was further ordered that the receiver should be continued until the sale thereby directed be had. The money reported due to Mr. Robert Hutton was not paid to him by Mrs. Leslie the plaintiff; and the six calendar months expired on the 19th of May 1848.

Mr. Hutton's Counsel insist that the bill now stands dismissed with costs, as against him; and such is the case, as the English practice of obtaining a final order to dismiss, as laid down in *Faulkner v. Bolton* (a), and in *Stuart v. Worrall* (b), and in *Daniel's Chancery Practice*, 2nd ed., p. 989, has not been adopted in Ireland. The form of the final order to dismiss in a redemption suit in England will be found in *Seton on Decrees*, p. 147. Mrs. Leslie the plaintiff has signed a consent that the proceedings in said suit should be stayed. The defendants however who are entitled to the equity of redemption have declined to sign the consent. The question then arises, whether in a suit for redemption and sale, where the bill stands dismissed with costs, as against the mortgagee, in consequence of the sum reported due to him not having been paid within the six calendar months, the suit can in general be proceeded with, and is to be considered a pending suit?

(a) 7 Sim. 319.

(b) 1 Br. C. C. 581.

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I have communicated with Mr. Long, the Registrar of the Court of Chancery, on this subject, and there is much doubt on the question. He has furnished me with the papers in two cases—one in this Court, and another in the Court of Exchequer. In the case of *Joly v. Rumley*, a consent order was made in this Court on the 8th of November 1844, after a bill for redemption and sale had been dismissed with costs as against the mortgagee, that the proceedings should be carried on and a sale had, the said mortgagee undertaking to execute the necessary deed of conveyance. In the case of *Holden v. Baillie*, in the Court of Exchequer (which Mr. Tench has been so good as to furnish me with a full note of), the Court of Exchequer granted the carriage of the proceedings in the cause to the mortgagee, after the suit had been dismissed with costs as to him, in consequence of his not having been redeemed within six calendar months after the date of the Remembrancer's report, as ordered by the decree; and in that case the mortgagee had actually taxed his costs as upon a dismissed suit, and had been paid those costs by the plaintiff in the suit at the time when the Court made the order giving him the carriage of the proceedings. The Court of Exchequer must have considered the suit as a pending suit, or the carriage of the proceedings could not have been given to the mortgagee.

Mr. Long having, as I understand, communicated with Master Henn on the subject, appears to consider that if the title-deeds were under the control of the Court, and lodged in the Master's office, the Master might proceed to sell the lands, but not the equity of redemption. If the produce of the sale was more than sufficient to pay the amount reported due to the mortgagee, and his costs, and an allocation order was made by the Court on the consent of the purchaser to pay the amount reported to the mortgagee, and his costs, and he should decline to receive the amount or execute the deed of conveyance, a question would arise, whether a supplemental bill might not be filed against him to compel the execution of the deed, and to charge him with the costs of such supplemental suit? If any case should arise where the title-deeds shall be under the control of the Court, and in other

respects similar to the present, I shall request the Masters to state to me the course adopted in the Masters' offices, where a decree for a sale has been made in a suit for redemption and sale, and where the bill stands dismissed with costs as against the mortgagee, in consequence of his not having been redeemed within the six calendar months.

However, under the particular circumstances of this case, I think I may make an order, without deciding what the course of proceeding should be in ordinary cases of decrees in such suits. The petitioner is not only the first incumbrancer, but he has the title deeds. Under the 143rd General Order of the Court, no lands can be put up to sale by any Master of this Court until the title-deeds and other documents necessary to make out title shall have been deposited with the Master. I do not think that I have any jurisdiction, in the cause of *Leslie v. Young*, to order Mr. Hutton, against whom the suit has been dismissed with costs, to bring in the deeds. I do not therefore see how there can be a sale in said suit, unless Mr. Hutton should consent to such an order as was made in the case of *Joly v. Rumley*, or apply for the carriage of the proceedings, as in the case in the Court of Exchequer.

I am of opinion, therefore, upon the whole, that as the suit of *Leslie v. Young* cannot be proceeded with, and as no sale can take place thereunder, by reason of the petitioner being in possession of all the title-deeds, I have authority under the 67th section of the Incumbered Estates Act to direct that the proceedings in said suit shall be stayed. Mrs. Leslie, on the terms of being entitled to her costs in said suit, consents to such order. I shall make the usual order of reference under the 10th section of the Act; and I shall order, under the 68th section of the Act, that all proofs of debts and other proceedings, and such evidence as shall have been taken in the said cause of *Leslie v. Young and others*, may be adopted and used in the proceedings under this petition, in the same manner as if the same had been originally taken under this petition. I shall entitle the order in the petition matter and in the cause, and I presume the report of the Master will not repeat over again what has been

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already found in the case of *Leslie v. Young*; it should only refer to what has been already found.

As the several proceedings already had in the cause of *Leslie v. Young* are to be adopted in this matter, I think the plaintiff in that suit will be entitled to the costs. I shall not however give her any costs of appearing on this petition. I must add that I disapprove of the course pursued by the petitioner, of presenting to the Court so voluminous and prolix a petition. I wish it to be understood that I shall not sanction or permit the abuse which has grown up as to equity pleadings to be applied to cases under the Incumbered Estates Act. Every deed set out in such a petition must be abstracted with as much conciseness as is consistent with clearness; and as I shall have to read over every petition, I shall either adopt the course of dismissing prolix petitions, without prejudice to presenting petitions in proper form, or I shall make such order as to the costs as shall prevent such a document as the petition in this matter from being again presented. The petitioner must take care, in carrying on the proceedings before the Master, that no unnecessary expense shall be incurred. The Master, under the proposed General Orders, will have to state the number and dates of the meetings before him, and I shall be able to form a judgment when the case comes back, whether the case has been fairly conducted in the office, or whether it has been carried on with the view of accumulating costs. I have drawn up the order which I propose to make, and when the parties have read the order it may be mentioned by Counsel if any alteration shall be sought therein. Mrs. Leslie, the plaintiff, is not entitled to the costs she is liable to pay to Mr. Hutton, as she ought to have redeemed him.

Order.

The petitioner Robert Hutton undertaking to submit to such order as the Court may think proper to make, in the event of its appearing on the enquiries hereinafter directed, that the petitioner is not a person authorised by the statute to present the petition in this matter; and the petitioner stating to the Court by his solicitors Messrs. Leonard Dobbin and Company, that there is not, to their

knowledge or belief, any person having any estate or interest in the lands and premises in the said petition mentioned, or having any incumbrance or incumbrances or charge thereon, or whose consent is necessary to a sale thereof, other than the persons severally named as such in the said petition; and the petitioner further stating to the Court by his said solicitors, that there is not to their knowledge or belief any suit now pending in this Court or the Court of Exchequer for the foreclosure, redemption, or sale of the lands and premises in the petition mentioned, or of any part thereof, unless the suit of *Leslie v. Young and others* be considered a pending suit within the meaning of the said Act: It is ordered by the Right Honorable The Master of the Rolls that it be referred to the Master in rotation to enquire and report what estate or interest (if any) the petitioner has in the lands, tenements and premises in the petition mentioned, and the uses, or limitations and trusts (if any) to which said lands, tenements and premises stand limited or settled; and further, to enquire and report the incumbrances and other charges affecting the same, including as well such as are claimed by the petitioner and by the parties to whom same have been reported in said cause of *Leslie v. Young and others*, and by the persons who shall come in under this order, as all such others as shall appear from the title-deeds, or on search, or otherwise, as far as the same can be ascertained, and including also debts and incumbrances and other charges due or belonging to her Majesty, her heirs and successors: and the Master is further to enquire and report the persons entitled under such uses or limitations or trusts, and the persons in whom such incumbrances and charges are vested, and the order and priority of such incumbrances and charges, and the amount due thereon respectively, distinguishing principal monies from interest, and making all just allowances: and let all further proceedings in the said suit wherein Christiana Powell Leslie

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is plaintiff and William Young and others are defendants, be stayed; and in pursuance of the provisions of the 68th section of said Act, let all such proofs and debts and other proceedings, and such evidence as shall have been taken in such suit be adopted and used in the proceedings under this petition in the same manner as if the same had been originally taken under the present order of reference, and so that no duplicate costs shall be incurred or reported to any incumbrancer whose incumbrance is already reported in the said cause of *Leslie v. Young and others*: and declare the several parties to whom costs are decreed in said cause entitled to the same in the proceedings under the order of reference, save and except the costs of the petitioner Robert Hutton as defendant in the said suit: and declare that the said Robert Hutton is not entitled to such costs under this order, and that Mrs. Leslie shall not be entitled to said costs when she shall have paid same: and let the Master further enquire and report the value of the said lands, tenements and premises, and the annual head-rents, quit-rents and Crown-rents (if any), payable out of the same respectively, or out of any part thereof; and whether a good title can be made to the said lands, tenements and premises, or to any and what part thereof; and whether it is expedient that said lands, tenements and premises, or any and what part thereof, should be sold. And in case it should appear that the petitioner is not the first incumbrancer on said lands, tenements and premises, the Master is to report whether the said petitioner is in possession of the title-deeds and writings relating to the said lands and premises: and the better to enable the said Master to take the said accounts and make the said enquiries, the petitioner and all the persons to whom any sum is reported in said cause of *Leslie v. Young and others*, and all other persons coming in under this order, or bound thereby, are to produce before the Master all deeds, books and writings in their custody or power relating thereto as

the Master shall direct, save in such cases as are excepted by the 10th section of the said Act; and the petitioner, or such other persons as aforesaid, are to be examined on interrogatories as the Master shall direct, who, in taking said accounts, is to make unto such persons all just allowances, and the Master is to cause the advertisements to be published, as by the said Act is directed; and let the said Christiana Powell Leslie, Mr. William Young and Mary Clemina Young and Miss Margaret Young a minor, who have appeared on the hearing of this petition, abide their own costs; and let the receiver appointed in the said cause of *Leslie v. Young* be extended to this matter; and the Court doth reserve further directions until the return of the Master's report.

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Ex parte KENNEDY,

In the Matter of the Act to Facilitate the Sale of Incumbered Estates in Ireland.

1848.
Nov. 29.
Dec. 2.
1849.
Jan. 27.

THE petition was presented by Hugh Kennedy, as owner of the lands of Ballycultragh, in the county of Down, for a sale under the Act to Facilitate the Sale of Incumbered Estates.

Previously to the 1st of October 1828, Hugh Kennedy was seised in fee of the lands of Ballycultragh, and of the lands of Ballygraney, Ballykeel and the Holywood mill; certain other lands in the county of Down called the Dundonald estate, the rental of which was £3000, and the Burgage lands of Cashel, in the county

The Court is not bound to make an order for sale under the Incumbered Estates Act, if it would not decree a sale in a plenary suit.

Therefore, where by a deed between father and son, for large

consideration from the son, his object being to preserve B in the family, the lands of A and B were conveyed to a trustee in trust to sell A in the first instance to pay off incumbrances and debts of the father; and as to B, subject to so much of the debts and incumbrances as should remain unpaid by the sale of A, in trust to raise a certain sum to pay the charges and incumbrances, and subject thereto to the father for life, remainder to the son in fee, the Court refused to make an order for the sale of B on the father's petition, a part of A remaining unsold.

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of Tipperary were, by a settlement of the 12th of November 1799, limited, after the death of Thomas Hughes and Grace Dorothea Hughes, to the use of Hugh Kennedy for life, with the remainder to his first and other sons in tail. The Dundonald estate was subject to £1000 for younger children, and to a power to Hugh Kennedy to charge a jointure of £100 for a second wife, and £1000 for the children of a second marriage. The Cashel estate was charged with £2000 for younger children. John Hughes Kennedy was the eldest son of Hugh Kennedy. By an arrangement between them, which was carried into effect by a deed of the 1st of October 1828, it was agreed that all the estates should be conveyed to trustees in trust in the first instance to sell the Dundonald and Cashel estates, and the lands of Ballykeel and Holywood, for the purpose of paying certain judgment, specialty and simple contract debts of Hugh Kennedy; and as to the lands of Ballycultragh (subject to so much of the debts and incumbrances affecting the estates as should remain unpaid by the produce of the sale of the other estates, and subject to two annuities), upon trust by mortgage to raise such sum or sums of money not exceeding £40,000 as the trustee should think right, and to apply the same for the payment and discharge of the said charges and incumbrances, and upon further trust to pay the residue of the rents to Hugh Kennedy for life, remainder, subject to a jointure for the second wife of Hugh Kennedy, to John Hughes Kennedy and his heirs. The recitals and limitations of the deed are fully detailed in the judgment of the Master of the Rolls. The mansion-house and a portion of the demense of Cultra was not comprised in the deed, but was limited by a deed of the 25th of December 1807, to Hugh Kennedy for life, remainder to his first and other sons in tail. Under the provisions of the deed, the Dundonald estate and the lands of Ballykeel and Holywood were sold by the trustee. The proceeds of the sale, amounting to the sum of £56,225, were applied in payment of the debts of Hugh Kennedy.

John Hughes Kennedy died on the 29th of December 1839, unmarried, having devised all his estates over which he had a disposing power to Robert Steward Kennedy, his next brother and tenant in tail in remainder of the demesne lands of Cultra.

On the 13th of April 1844 Hugh Kennedy, in consideration of £1950, conveyed all his estate in the demesne lands of Cultra, and in the lands comprised in the deed of the 1st of October 1828, to John Kennedy and his heirs, in as large and ample a manner as he had or ought to have the same by virtue of the said trust deed. A deed declaring certain trusts in favour of Hugh Kennedy was executed. There was no date to the deed; but it was endorsed as if executed on the 30th of April 1844.

The petition stated the provisions of the deed of the 1st of October 1828, and the incumbrances which affected the inheritance of the lands comprised in the said deed remaining unsold. The incumbrances were set forth in a schedule and amounted to £52,120. 4s. 6d. The rental of the unsold estates was £4241. 16s. 4½d. The petition also stated that frequent attempts had been made to obtain a purchaser for the Cashel lands, without effect, no offer having been made for the same, and that the sale of Ballycultragh would produce upwards of £40,000, and would be the means of effectually relieving the other portions of the estates from the incumbrances affecting them, and would enable the petitioner to reduce the rents of some of the tenants thereof, and otherwise to improve the same. But no allusion was made in the petition to the deed of the 13th of April 1844, or to the deed declaring the trusts of it. The former deed was disclosed by the affidavit of Robert Steward Kennedy, the latter referred to by the petitioner's Counsel in the course of the argument, and called for by the Court.

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Mr. Hughes and Mr. M'Causland, in support of the petition.

Argument.

Mr. Martley and Mr. W. C. Dobbs, for R. S. Kennedy.

In support of the petition it was contended that the facts stated brought the case within the words and policy of the Act, and that the Court was bound, notwithstanding the deed of 1828, to make an order for the sale of Ballycultragh. That the petitioner, by reason of the deed declaring the trusts contemporaneously within the deed of the 13th of April 1844, was an "owner" within the definition in

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the 2nd section. But even should the Court consider itself bound to carry out the provisions of the deed of 1828, it had power and was bound to make an order for the sale of the Burgage lands of Cashel.

Against the petition it was argued that grievous injustice would be done if the lands of Ballycultragh were sold in violation of the agreement carried into effect by the deed of 1828, for which large consideration had been given by John Hughes Kennedy. That Ballycultragh was not an incumbered estate within the meaning of the Act, for by the deed it was made but secondarily liable to the incumbrances, and the Act should be construed according to the principles of equity. That the petitioner having parted with all his interest in the lands by the deed of the 13th of April 1844, was not an "owner" within the meaning of the Act. The suppression of the deeds of 1844 from the petition was sufficient ground under the Act, on the general practice of the Court, for refusing an order.

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THE MASTER OF THE ROLLS.

In this case a petition has been presented by Hugh Kennedy, Esq., under the 2nd section of the Incumbered Estates Act, for a sale of the lands of Ballycultragh for the payment of incumbrances affecting them.

The petitioner is tenant for life of the said lands, under a certain deed of settlement bearing date the 1st of October 1828.

That deed was made between the petitioner Hugh Kennedy and Sophia Kennedy his then wife, of the first part; John Hughes Kennedy, his eldest son by Grace Dorothea Kennedy, of the second part; and certain other persons of the third, fourth and fifth parts.

It appears from the recitals therein contained, that by a certain settlement executed on the marriage of the petitioner with his first wife Grace Dorothea Hughes, and bearing date the 12th of November 1799, the lands of Ballybean and Carrowreagh, in the county of Down, called the Dundonald estate, were settled on the petitioner Hugh Kennedy for life, with remainder to the first and other sons of the marriage, in tail male.

There are other limitations relating to said lands in that deed,

but they do not appear material to the questions which arise on this petition.

Certain other lands the property of Thomas Hughes, the father of Grace Dorothea Hughes, were also settled by the deed of 1799 upon the first and other sons of the marriage, after the death of Thomas Hughes and Grace Dorothea Hughes, to whom life estates were limited. These lands are called the Burgage lands of Cashel, and are situate in the county of Tipperary, and appear by the schedule to the petition to produce an annual rental of £966. 18s. 5d.

The petitioner upon the death of his father became seised in fee of the lands of Ballycultragh, which are now sought to be sold, and of certain other lands in the deed mentioned.

The deed of 1828, after reciting amongst other things the matters I have stated, further recited that the petitioner had confessed judgments, and contracted mortgage, annuity, bond and simple contract debts to a large amount, and in consequence thereof it had become expedient to make some provision for the payment of the several incumbrances affecting the said estates, and of the debts so contracted as aforesaid; and it further recited that the petitioner Hugh Kennedy had applied to his son John Hughes Kennedy to join him, Hugh Kennedy, in selling the settled estates, consisting of the lands in the county of Down called the Dundonald estate, and of the Burgage lands of Cashel, in the county of Tipperary; and that Hugh Kennedy had further proposed to sell the lands of Ballykeel, and the Holywood mill, being part of the lands of which said Hugh Kennedy was so seised in fee; and that the money to be produced by the several sales, after discharging the incumbrances affecting the settled estates, and also the sum or sums of money which should be raised or borrowed by way of mortgage, pursuant to the trust thereafter mentioned, should go and be applied in and towards the payment and discharge of the debts and incumbrances so affecting the lands whereof Hugh Kennedy was seised in fee; and also in paying off and discharging the simple contract debts then due and owing by Hugh Kennedy, to the extent thereafter mentioned. The deed further recited that

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the petitioner Hugh Kennedy had further proposed to settle and assure the residue of his estate of which he was seised in fee, consisting of the lands of Ballycultragh (save the house and demesne of Ballycultragh, which were settled on his eldest son by a certain deed of the year 1807); and also the lands of Craigward, Ballyrobert, Ballydavie and Ballygraney, to the uses thereafter declared, subject nevertheless to so much of the debts affecting the same as should remain due and unpaid by the produce of such sales; and the deed further recited that John Hughes Kennedy, the petitioner's eldest son, being desirous of relieving his father from his embarrassments, and also considering it more advantageous to preserve the lands of Ballycultragh, *alias* Cultra, and the other lands so held in fee by the petitioner, in the family, than to suffer same to be sold, had agreed to the proposal so made by his father the petitioner.

The deed further recited that common recoveries had been suffered of the settled estates by the petitioner and his said son; and witnessed that the petitioner and his eldest son conveyed said settled estates, and the petitioner conveyed the fee-simple lands of Ballykeel and Holywood mill to a trustee and his heirs, upon trust to sell the settled estates, and the lands of Ballykeel, and the said mill, and until sale to receive the rents thereof; and it was declared that the proceeds of such sale and the rents and profits until the sale should be applied—first, to pay the necessary expenses, and then upon trust out of the trust moneys and produce of such sales, to pay off and satisfy the incumbrances affecting the lands so to be sold; and after payment thereof then upon trust to pay and apply the residue of the said moneys and produce (so far as the same should extend) in payment and satisfaction as well of the several charges and incumbrances specifically affecting the lands of which the petitioner at the time of executing deed of 1828 was seised in fee, as of the several recognizances, judgment, bond, and other specialty debts of the petitioner, theretofore contracted and then due; and also in discharge of the simple contract debts of the petitioner Hugh Kennedy theretofore contracted and then due, so as the said simple contract debts so to be paid off should not exceed

the sum in the deed mentioned.—There is a blank in the copy of the deed sent to me as to the said sum.

Then follows in the deed a conveyance by the petitioner of the lands of Ballycultragh (save the house and demesne, which, by the deed of 1807, had been settled on the eldest son John Hughes Kennedy after his father's death, upon certain conditions, which were performed by him); as also a conveyance of the other unsettled lands, save the lands of Ballykeel and the Holywood mill; *habendum*, subject to so much of the debts and incumbrances affecting the estates as should remain due and unpaid by the means aforesaid to the trustee named in the deed, and his heirs, upon trust to pay certain specified annuities, and to raise by mortgage a sum not exceeding £40,000, to be applied in further payment of the said charges and incumbrances; and subject thereto and to the interest of the unpaid incumbrances, on trust to pay the residue of the rents to the petitioner for life, and subject to a jointure for the petitioner's second wife, upon trust for John Hughes Kennedy, the petitioner's eldest son, and his heirs for ever.

The trustee named in the deed of 1828 acted in the trusts thereof, and the lands of Ballykeel and the Holywood mill, of which the petitioner was seized in fee at the time of the execution of the deed of 1828, as also the Dundonald estate, or a part thereof, which Dundonald estate was part of the settled estate which the petitioner's eldest son agreed by the deed of 1828 to concur in the sale of to pay his father's debts, were sold, and produced on the sale a sum of £56,225, which was applied under the provisions of the deed of 1828.

John Hughes Kennedy, the petitioner's eldest son, died in December 1839, and the respondent Robert Steward Kennedy, who has opposed this application, is entitled under his brother John Hughes Kennedy's will to all his estate and interest in the lands of Ballycultragh, &c., so settled on John Hughes Kennedy by the deed of 1828. The petitioner has presented the petition for the sale of the lands of Ballycultragh, the object of the deed of 1828 having been that those lands should be preserved in the family; and John Hughes Kennedy, the petitioner's eldest son, having given

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full and most valuable consideration for the settlement of the lands of Ballycultragh on him and his heirs.

In order to understand the consideration given by John Hughes Kennedy for the settlement of the lands of Ballycultragh, it is to be observed, that when he executed the deed of 1828, he was entitled in remainder after the death of the petitioner, his father, to what I have called the settled estates, *i. e.*, the lands belonging to his father and mother, or their ancestors, which were settled by the deed of 1799. These lands, at the time of the execution of the deed of 1828, were only subject to charges and incumbrances amounting to £4000.

The portion of the settled estates which have been sold under the provisions of the deed of 1828 has produced £56,225. The annual rental of the unsold portion, *viz.*, the Burgage lands of Cashel, appears by the schedule to the petition to be £966. 18s. 5d. a-year. Thus the estates settled by the deed of 1799 on John Hughes Kennedy, the petitioner's eldest son, after the petitioner's death were worth something about £3000 a-year, subject only to about £4000, and he agreed by the deed of 1828, that the settled estates should be sold to pay his father's debts, on the terms of his father settling Ballycultragh in remainder on him after his father's death, subject to the charges stated in the deed of 1828.

The deed of 1828 was by no means a favourable arrangement to John Hughes Kennedy; and the consideration moving to John Hughes Kennedy, and those now representing him, was that the lands of Ballycultragh should remain in the family. To prevent the alienation of Ballycultragh, he executed the deed of 1828, and gave up the lands settled on him by the deed of 1799; and now the petitioner, in direct violation both of the express terms as well as of the spirit and intention of the deed of 1828, seeks to sell the lands of Ballycultragh to pay his own debts, leaving the Burgage lands of Cashel, producing an annual rental of £966. 18s. 5d., unsold, the deed of 1828 expressly providing for the sale of the latter lands amongst others as a primary fund to exonerate Ballycultragh.

The first question which arises is, whether the Incumbered Es-

tates Act compels this Court to assist the petitioner in his unjust attempt to set aside the settlement of 1828 ?

I am of opinion that I am not bound by any thing contained in that Act so to do.

By the 10th section of the Act, the Court, in cases falling within the statute, is at liberty to direct the Master to enquire, amongst other matters, whether the incumbrances or charges stated in the petition affect any land or estate other than the land or lease which shall be desired to be sold, and whether such other land or estate shall be liable in priority, or in equal degree, or in posteriority. And the 11th section provides that all laws, rules, orders, discretionary powers and practice in force, or which shall be in force with respect to proceedings in the Court in a suit for foreclosure or redemption of a mortgage, or the sale of estates for payment of incumbrances or debts not being inconsistent with the provisions of the said Act, or with any rule or order to be made by the Lord Chancellor of Ireland, shall apply to the circumstances of this case so far as circumstances will permit.

It is plain, if it were sought in a plenary suit to sell Ballycultragh, that the Court would direct that the Burgage lands of Cashel should be first sold, those lands being the primary fund applicable to pay incumbrances under the deed of 1828.

The 11th section of the Incumbered Estates Act shows that the Court ought not to adopt a different course upon this summary proceeding, and that the lands of Ballycultragh ought not to be sold in priority to the Burgage lands of Cashel, in violation of the provisions of the deed of 1828.

I am therefore of opinion that the petition is unsustainable, the same being framed with the distinct object of setting aside the provisions of the deed of the 1st of October 1828.

The petition is also unsustainable on another ground. By the deed of 1828 the legal estate in the lands of Ballycultragh was vested in the trustee. The respondent's Counsel have produced the copy of an instrument, bearing date the 13th of April 1844, and also an attested copy of the memorial of such deed, which was registered the 6th of July 1844, by which the petitioner, in consideration of a sum

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of £1950, conveyed to one John Kennedy all his (the petitioner's) right, title and interest to the rents and profits of the lands of Ballycultragh; and the petitioner thereby covenanted that he had not done, and would not do, any act, deed or thing whatsoever whereby the said John Kennedy should be hindered or prevented from having and enjoying the said rents and profits, or any part thereof; and after covenants for title and further assurance, the petitioner appointed John Kennedy his attorney irrevocable to receive the said rents and profits.

It appears to be quite clear that the petitioner having thus, by the deed of 1828, parted with all legal title to the lands of Ballycultragh in the petition mentioned, and having by the deed of the 13th of April 1844 parted with all his equitable estate or interest in the lands, is not an owner of land within the meaning of the 2nd section of the Incumbered Estates Act, as explained by the interpretation clause, and had therefore no right to present this petition.

This objection being conclusive against the petitioner upon the documents before the Court, the petitioner's Counsel having been so instructed, suggested to the Court that John Kennedy, to whom the petitioner had conveyed all the estate and interest which he had in the lands in the petition mentioned, had executed an unregistered deed of trust of equal date with the registered deed of the 13th of April 1844, and that under the provisions of the said unregistered deed of trust the petitioner had an interest which entitled him to present this petition as an owner of land under the Act.

Having called for the alleged deed of trust last Term, it was not produced; and when I was about to give judgment in this case on the second day of this Term, I was requested by the Counsel for the petitioner to postpone giving judgment until the deed was produced. A copy of a deed was accordingly sent to me, without any date and without the names of the witnesses thereto, and which copy, I may observe, is not a correct copy. Having called for the original deed it was sent to me, and although there is a blank for the date in the body of the deed, it is indorsed as dated the 30th of April 1844, and is not of equal date with the registered deed, if the memorial of the registry of the deed produced by respondent's Counsel is correct.

No affidavit has been made verifying the alleged deed of trust, or stating when it was executed. It was the duty of the petitioner not to suppress from the Court in his petition the existence of the two deeds of 1844.

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The 7th section of the Incumbered Estates Act enacts amongst other matters, that every petition for the sale of land shall set forth the estate or interest of the petitioner in such land, and the uses or limitations and trusts, if any, to which the land stands limited or settled.

Notwithstanding this precise provision, the petitioner has thought proper to suppress from his petition the two deeds of 1844, in direct violation of the terms of the said 7th section, and has produced the alleged deed of trust without having been in any way verified, after the Court was about to give judgment upon the case, and only because the respondent, by the production of the registered deed of 1844, had put him out of Court. Under those circumstances I shall dismiss the petition with costs. I shall do so without prejudice to the petitioner presenting a petition in which he shall not suppress the facts from the Court.

Although the petition has been framed with the view to sell Ballycultragh and to sell the Burgage lands of Cashel, Counsel for the petitioner has contended that I am bound to direct a reference to the Master under the 10th section of the Act, and that if the Master should report that the Burgage lands of Cashel are liable to the incumbrances in priority to the lands of Ballycultragh, that the Court can in such case order the sale of the latter lands; although the petition is unsustainable so far as it seeks to sell the lands of Ballycultragh. In answer to that argument it might be sufficient to say, that that is not the case made by the petition, or the relief sought thereby.

The answer, however, which is conclusive against the argument is, that the legal estate not only in Ballycultragh, but in all the lands mentioned in the petition, was vested in the trustee of the deed of 1828; and the petitioner by the registered deed of 1844 parted with all the equitable estate or interest which he had in Ballycultragh, or in any of the lands in the petition mentioned, and

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is, therefore, upon the documents before the Court, not an owner of land within the statute; and I shall not enter into an enquiry as to the effect of the alleged trust deed of alleged equal date which has been produced to the Court under the circumstances I have already stated, such instrument not having been in any way verified, or in any way referred to in the petition.

The petition has been framed in direct violation of the 7th section of the Act. The two deeds were, in my opinion, intentionally suppressed from the petition. The respondent's solicitor and Counsel have, I believe, never seen the alleged deed of trust of the 30th of April 1844, and as I have not heard any argument upon the construction of that deed, I shall not at present offer any opinion as to its effect.

If a petition should be presented properly framed, seeking to sell the estates in accordance with the provisions in the deed of 1828, and according to the agreement therein contained, and if such petition should in pursuance of the 7th section of the Incumbered Estates Act set forth the important portions of the said two deeds of 1844, the respondent's Counsel will have the opportunity of arguing whether the petitioner under the provisions of these two deeds is an owner of land within the meaning of the said Act.

If the General Orders had been in force when this petition was presented, the two deeds of 1844 could not have been suppressed from the petition without a violation of the oath which the petitioner is by those Orders required to take; and this case strongly shows the necessity of the provision in the Orders to which I have referred; as I believe I could show matter upon the face of the documents, to which I do not wish particularly to advert, which would establish that the suppression of the two deeds of 1844 from the petition was intentional, the petitioner not being aware that the respondent's solicitor had searched the registry and discovered the deed of the 13th of April 1844.

I shall dismiss the petition with costs, without prejudice to the petitioner, if he shall be so advised, presenting a petition for the sale of the lands in the petition mentioned, in accordance with the provisions contained in the deed of the 1st of October 1828.

1848.

Rolls.

Ex parte LORD BLAYNEY,

In the Matter of the Act to facilitate the Sale of Incumbered Estates
in Ireland.

Nov. 29.

Dec. 18.

THE petition was presented by Lord Blayney, as owner, for a sale of the Castle Blayney estate, under the 11 & 12 Vic. c. 48, s. 2.

The petition stated the title of Lord Blayney under a deed of settlement of the 13th of March 1826, by which the estate was conveyed to trustees, the survivor of whom was John William Alexander, to the use of Lord Blayney for life, with remainder to the same trustees to preserve contingent remainders; with remainder to the first and other sons of Lord Blayney in tail male; with remainder to his right heirs, subject to a jointure of £1500 late currency to Mabella Lady Blayney, and to charges stated in the schedule to the petition to amount to £38,461. 10s. 8d. Lord Blayney was not married.

Form of order for the sale of lands under the Incumbered Estates Act, at the petition of an owner tenant for life, remainder to his first and other sons in tail, remainder to himself in fee, there being no issue, and notice having been served on the surviving trustee to preserve contingent remainders.

The petition also stated, that on the 17th of November 1848, Lord Blayney entered into a contract for the sale of the estate for £180,000 to Thomas I. Dimsdale, as trustee for some English capitalists, discharged of Lady Blayney's jointure.

Mr. *Brewster*, with whom was Mr. *Norman*, moved on the petition; when—

Argument.

The MASTER OF THE ROLLS directed the matter to stand over, that notice might be given to the surviving trustee to preserve contingent remainders; and that the consent of Lady Blayney might be obtained.

Judgment.

The consent of Lady Blayney having been obtained, and Counsel having appeared for J. W. Alexander, the surviving trustee, and disclaimed, his Honor made the following order:—

The petitioner undertaking to submit to such order as the Court may think proper to make, in the event of its

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appearing on the enquiries hereinafter directed, that the petitioner is not a person authorised by the said Act to present the petition in this matter, and the petitioner stating to the Court by his solicitors, Messrs. Young and Lambe, that there is not, to his or their knowledge or belief, any person having any estate or interest in the lands, tenements and premises in the said petition mentioned, or having any incumbrance or incumbrances or charge thereon, or whose consent is necessary to a sale thereof, other than the persons severally named as such in the said petition; and the petitioner further stating to the Court by his said solicitors, that there is not, to his or their knowledge or belief, any suit now pending either in this Court or the Court of Exchequer for the foreclosure, redemption or sale of the lands, tenements and premises in the petition mentioned, or any part thereof; and Mabella Lady Blayney having by a consent bearing date the 7th day of December 1848, and signed by her, consented that the said lands, tenements and premises should be sold discharged of her jointure, on the terms that an annual sum equivalent to the said jointure should be secured to her in the manner stated in such consent: it is ordered by the Right Honorable the Master of the Rolls, that it be referred to the Master in rotation to enquire and report what estate or interest, if any, the petitioner has in the lands, tenements and premises in the petition mentioned, and the uses or limitations and trusts, if any, to which said lands, tenements and premises stand limited or settled; and further, to enquire and report the incumbrances and other charges affecting the same, including as well such as are claimed by the parties who shall come in under this order, as all such others as shall appear from the title-deeds, or on search or otherwise, as far as the same can be ascertained, and including also debts and incumbrances, and other charges due or belonging to her Majesty, her heirs and successors. And the Master is further to enquire and report the persons

entitled under such uses or limitations and trusts, and the persons in whom such incumbrances and charges are vested, and the order and priority of such incumbrances and charges, and the amount due thereon respectively, distinguishing principal monies from interest, and making all just allowances. And the Master is further to enquire and report who is in possession of, or in receipt of the rents, issues and profits of the said lands, tenements and premises respectively, and the value of the said lands, tenements and premises respectively; and whether the sum of £180,000 in the contract for sale of the 17th day of November 1848, in the petition mentioned, is the full and fair value of the fee-simple and inheritance of the said lands, tenements and premises, discharged from all charges and incumbrances whatsoever. And the Master is further to enquire and report the quit-rents and crown-rents and other rents, if any, payable out of the said lands, tenements and premises respectively, or out of any part thereof: and the better to enable the Master to enquire and report as to the value of the said lands, tenements and premises, let the petitioner lay before the Master a rental of the said lands, tenements and premises, verified upon oath, stating the tenants' names, the dates of the leases or other instruments, if any, under which each tenant respectively holds, the tenure of each tenant, the number of acres held by each, and the annual rent payable by each tenant, and the number of acres in the actual possession of the petitioner. And the Master is further to enquire and report whether a good title can be made to the said lands, tenements and premises, or to any and what part thereof; and whether it is expedient that the contract for sale in the petition mentioned should be carried into effect under the provisions of the said Act, having regard to the value of the said lands, tenements and premises, and the amount of the incumbrances and charges affecting the same: and the better to enable the

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said Master to take the said accounts and make the said enquiries, the petitioner and all other persons coming in under this order or bound thereby are to produce before the Master all deeds, books and writings in their custody or power relating thereto, as the Master shall direct, save in such cases as are excepted by the 10th section of the said Act; and the petitioner and such other persons as aforesaid are to be examined on interrogatories as the Master shall direct; and the Master is, amongst other matters, to examine the petitioner on interrogatories to ascertain that there is no bargain, agreement or understanding between him and Mr. Thomas Isaac Dimsdale in the petition mentioned, or with any other person or persons whatsoever, that any sum of money or other consideration save and except the sum of £180,000, in the petition mentioned, is to be paid to or for the use or in trust for the petitioner, and that no sum of money or other consideration has been paid to the petitioner in relation to the said contract for sale in the petition mentioned. And the Master, in taking the accounts hereby directed, is to make all just allowances and cause the advertisements to be published as by the said Act is directed. And William John Alexander, otherwise William John Alexander Shaw, the surviving trustee in the deed of the 13th of March 1826, having been served with notice of the petition, and having appeared by his Counsel, and it appearing that he did not execute said settlement, and has declined to accept the trusts thereof, and has by his Counsel in open Court disclaimed any estate or interest conveyed to him by the said deed; let the petitioner pay to the said William John Alexander Shaw the sum of £5 for appearing on the motion, and reserve further directions until the return of the report.

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(Chancery.)

May 13, 14, 25.
 July 10.

MATTHEW SHEE, by his will dated the 25th of May 1832, after giving certain properties to his wife Elizabeth for her life, devised them after her death as follows :—

“I leave, devise and bequeath the said several towns, lands,” &c., “unto John Archbold, of the city of Waterford, Esq., his heirs, executors, administrators and assigns, according to the nature of the said several estates and interests in the said several lands, upon trust nevertheless, and to and for the several uses, trusts,” &c., that is to say, “that he the said John Archbold, his heirs, executors, administrators and assigns, shall and do as soon as conveniently may be, after the decease of my said wife the said Elizabeth Shee, procure on lease or otherwise, as he or they may think most advantageous, one or more house or houses adjoining each other in the city of Waterford or the environs thereof, sufficiently large to lodge therein twenty poor men and twenty poor women of sober and respectable characters and habits, and on the death or removal of them, or any of them, to fill up their places with persons of a similar description, and to pay to each of the said poor men and poor women yearly and every year, by two equal half-yearly payments the sum of £4 sterling; but if the rents or produce of my said towns-lands,” &c., “so devised for the purposes aforesaid, shall not be found sufficient to pay the said annual sum as aforesaid, then that the said John Archbold shall have full power and authority to dismiss any number of the said men and women,” or to limit the admissions, “or at the discretion of the said John Archbold, his heirs, executors, administrators or assigns, to abate rateably” the annual sums payable

The Charitable Bequests Act 7 & 8 Vic. c. 97, authorising the Commissioners of Charitable Donations to sue for devises or bequests withheld, concealed or misapplied, and to apply them according to to the devisor's intention, gives the Commissioners such an interest as entitles them to file a bill for the removal of a testamentary trustee for a charity and the appointment of new trustees; and the proceeding need not be by information, and such relief will be granted on account of the mere personal unfitness of the trustee.

Form of decree for removing a trustee who may still be entitled to a control as to the objects of the charity.

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to the objects of the charity, within certain specified restrictions. The will then contained a declaration that John Archbold, his heirs, &c., "should not be liable for any loss or losses, unless the same happen by his wilful neglect or default, that might happen relating to or concerning the trust or trusts thereby in him reposed;" and a power to the trustee, his heirs, &c., to make leases for twenty-one years at the most improved rents without fine; and a power to apply such parts of the rents and profits to paying the rent and repairs and improvements of the houses and other necessary charges and expenses, and also to appoint a receiver at such reasonable salary as he, his heirs, executors, &c., should think proper, followed by these words: "giving to my said trustee and to his heirs, executors, administrators and assigns, the power to use his or their own discretion in the management of said charity as to such matters and things as I have not particularised herein, always keeping in view the exclusive interest and benefit of the said charity, and of the poor people to be maintained and lodged therein."

At the date of this will Mr. Archbold was resident at Waterford, and was a Director of the Waterford branch of the Provincial Bank. The testator died soon after. About the year 1834 Mr. Archbold lost his situation at the Bank, left Waterford, and went to reside in France. In December 1844 Elizabeth Shee died. Shortly after her death Mr. Archbold came for a short time to Waterford, and employed himself about the trusts of the will. Being applied to, some time afterwards, by Mr. Matthews, the secretary of the Commissioners of Donations, he explained to him the accounts respecting the property. The charity, however, contemplated by the will was not established in 1846, and in April in that year the bill in this cause was filed against Archbold. The plaintiffs were the Commissioners of Charitable Donations and Bequests appointed under statute 7 & 8 Vic. c. 97.

The bill stated that the fund devised had become available for the charity; but that the defendant had in 1834 been dismissed from his situation in the Bank, and being greatly embarrassed had absconded, and since continued out of the jurisdiction; that although he returned for a short time after Elizabeth Shee's death, yet he had

taken no steps to establish the charitable institution contemplated by the will; but after appointing a relative or intimate of his own, who resided in Dublin, to receive the rents of the trust property, had again returned to the Continent. It further charged that the defendant had neglected his duties as trustee, and though applied to by the plaintiffs, had refused to execute the trusts, and had misapplied the rents of the trust property to his own use; that when urged by the plaintiffs, he had threatened to pervert the charitable intentions of the testator to improper purposes; and though he pretended he had received no rents, yet he had or ought to have received large sums applicable to the charitable objects contemplated by the testator. It further charged that the defendant was not a fit person to execute the trusts, by reason of the circumstances mentioned in the bill, and his not having any residence in Waterford or the neighbourhood of the trust estates, so as to be able to manage or superintend them or the charity.

The bill prayed that the defendant might be removed from being trustee under the will; and that it might be referred to the Master to approve of one or more fit persons to be appointed trustee or trustees in place of the defendant, and that he might be decreed to convey all his estate and interest in the said trust estates to such person or persons as should be so appointed; and that an account might be taken of the rents and profits of the trust estates which had, or but for wilful neglect might have, been received by the defendant since Elizabeth Shee's death; and that the defendant might be decreed to pay to the plaintiffs upon the said charitable trusts what should appear to be due on such account; and an injunction and receiver.

The defendant in his answer denied that he had been dismissed by the Bank or absconded, and stated that he resided in France for family reasons; he detailed two occasions on which he had come to Ireland in 1845 about this charity; he also denied that he was embarrassed, or had ever threatened to pervert the charity, or had misapplied any part of the funds: and he entered into explanations concerning the state of the testator's property, which showed that he could not yet have established the contemplated charity, and had

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not been guilty of any misapplication or neglect in respect of the funds.

There was a considerable mass of evidence in the cause in reference to these charges and denials; the plaintiffs seeking to establish that the defendant had left Waterford in 1834 under grave suspicions respecting a sum missing at the Provincial Bank; that he had been a bankrupt; that he had threatened to Mr. Matthews to make the charity a "repeal asylum," and boasted that he might misapply its funds; and that from the amount of the property there must have been some misapplication of it. On the other hand, the evidence for the defendant went to contradict or explain away these proofs according to the statements in the answer. The view taken by the Court of the result of the evidence was that the defendant satisfactorily accounted respecting the property, and that no misapplication of it or wilful neglect such as to cause the loss of any part of it was established; but that sufficient of the other charges was proved to show that the defendant was unfit to be continued in the office of trustee. The grounds on which the Court came to this conclusion sufficiently appear in the judgment.

But the question of law chiefly discussed in argument arose on the frame of the suit and the effect of the Charitable Bequests Act.*

Argument.

The *Attorney-General*, Mr. Serjeant *Warren* and Mr. *Lefroy*, for the plaintiffs.

* Statute 7 & 8 Vic. c. 97, after providing for the appointment of the Commissioners of Charitable Donations and Bequests, and transferring to them the property vested in the former Commissioners, enacts (section 12), "That the said Commissioners of Charitable Donations and Bequests for Ireland may sue for the recovery of every charitable donation, devise or bequest intended to be applied in Ireland which shall be withheld, concealed or misapplied, and shall apply the same when recovered to charitable and pious uses, according to the intention of the donor or donors; and the said Commissioners shall be empowered to deduct out of all such charitable donations, devises and bequests, as they shall recover, all the costs, charges and expenses which they shall be put to in the suing for and recovery of the same: Provided always that no information shall be filed or petition presented, or other proceeding at law or in equity undertaken or prosecuted by the said Commissioners, until the same shall be submitted to and allowed by her Majesty's Attorney or Solicitor-General for Ireland, and such allowance certified by him."

Mr. *Brewster*, Mr. *Baldwin* and Mr. *Harris*, for the defendant, contended that a bill, not for the transfer of the property to the new Commissioners themselves but, for the appointment of new trustees, as this was, cannot be sustained; that the proceeding, if maintainable at all on the facts, should have been by information, and not by bill; that no withholding, concealment, or misapplication in relation to the trust fund was proved, and therefore the case was not one to which the statute 7 & 8 Vic. c. 97, s. 12, applied; and even if it was, that Act only authorises the Commissioners to substitute themselves for the trustee; that for the same reasons there could be no account; and that for any part of the relief sought, mere personal objections to the trustee, such as were here relied on, were not sufficient. It was further argued that, even if personal unfitness could be made a ground of relief, it was not proved.

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Mr. Serjeant *Warren*, in reply, argued that the objection to the form of the pleading was equally applicable to proceedings by the former Board of Charitable Bequests under the statutes 3 G. 3, c. 18, and 40 G. 3, c. 75, and yet decrees on similar bills had been often made; that the probability of the misapplication of the fund which was made out here, and the bankruptcy of the defendant and his personal unfitness for the office, were sufficient grounds for removing him; that it followed from the plaintiff's interest in protecting the property they might file a bill for his removal.

Attorney-General v. Wimborne Schools (a); *Oliver v. Court* (b); *Caffrey v. Darby* (c); *Clough v. Bond* (d); *Lake v. De Lambert* (e); *In re Roche* (f); *Millard v. Eyre* (g); *Bainbridge v. Blair* (h); *Uvedale v. Ettrick* (i); 2 *Story Eq. Jur.* pl. 1191; *O'Leary on Charities*, p. 199, *et cas. ib. cit.*; and as to costs, *Crackelt v. Bethune* (k), *Tebbs v. Carpenter* (l), were referred to.

(a) 11 Jur. 400.

(b) 8 Price, 127.

(c) 6 Ves. 488, 495.

(d) 3 My. & Cr. 490, 496.

(e) 4 Ves. 592.

(f) 2 Dru. & War. 287.

(g) 2 Ves. jun. 94.

(h) 1 Beav. 495.

(i) 2 Chan. Cas. 131.

(k) 1 Jac. & Wal. 586.

(l) 1 Mad. 290.

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The LORD CHANCELLOR said he would consider the objections on the form of the suit and the construction of the Charitable Bequests Act, as to which he felt a difficulty; that if the frame of the suit was right, the removal would be almost of course, for he had no doubt that it was made out that the defendant was unfit to be continued in the office of trustee; for he was charged with a crime, and had never vindicated his character by an action; he was a bankrupt, and was not resident nor had property in Ireland; but that no wilful withholding or misapplication of the funds, or want of diligence in managing the property, was proved; and if the defendant did not rely on the technical objection, he would be inclined to give him his costs on his being removed. The case stood for judgment.

Judgment.

The LORD CHANCELLOR.

This bill was filed by the Commissioners of Charitable Donations acting under the statute by which they were appointed, 7 & 8 Vic. c. 97, s. 12. It is a suit seeking an account of the rents and profits of certain properties devised by the will of Matthew Shee, and to remove the trustee named in that will.

The property was bequeathed by this will for certain charitable purposes after the death of a person to whom a life estate was given, who died on the 23rd of December 1844. The present defendant, Archbold, was the trustee appointed by that will. The gift is in general words, to establish an alma-house for certain purposes which are specified. The will is dated May 1832.

[His Lordship read the words of the devise, as stated *ante* p. 187.]

The bill was filed on the 16th of April 1846, and, in addition to the account of the rents and profits, seeks, as I have said, to remove Mr. Archbold from his office of trustee. The grounds on which it is sought to remove him are generally these:—That, although at the time of making of the will, the defendant was resident in the city of Waterford, he has long since ceased to reside there; that he has no property; and that his credit and position have been affected by transactions connected with his having been a Director of the

Provincial Bank, his absconding from Waterford, being brought back in custody of an officer, and several thousand pounds of the assets of the bank being missing. It further appears that he was a bankrupt; and the plaintiffs also rely on certain communications between Mr. Matthews their secretary and the defendant Archbold, in which it appeared that the latter was seeking for remuneration for the execution of his duty as trustee, and asserting a power of doing what would be a great abuse of the trusts, and not applying the rents to the purposes of the charity.

The parties went into an account. So far as regards the actual receipts and dealings of the defendant with the rents, I am of opinion on the whole of the evidence that there has not been any breach of trust or any misapplication or default on the part of the defendant. I think the evidence shows that no unnecessary or improper delay has been permitted to occur in regard to the establishment of the charity; and that on the whole, assuming that the sum collected is now forthcoming, there is not any fault to be found with the management of this property by the defendant since it has come under his control. I formed this opinion when the cause was at hearing, and I retain the same impression still. The defendant has, I think, fully and satisfactorily explained the circumstances relative to the property, and shown that as much has been produced from it in the time as might have been expected from ordinary diligence and prudence in the collection of the rents, and that in not proceeding to the actual establishment of the charity until a larger fund was provided, he did not exercise an unwise or unsound discretion. After the discussion which the case underwent on this head at the hearing, I do not think it necessary now to go more into detail on the evidence which was then laid before the Court.

On the other part of this case, namely, the question whether it is fitting that the defendant should be permitted to remain a trustee of this property, I continue of the opinion which I expressed at the hearing, that it is the duty of the Court to remove him from that office and to appoint some other person to it.

I consider first the position of the defendant at the time the will of the testator in this cause was made. At that time the defendant

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was a resident of the city of Waterford, and a person of good credit and reputation there, because I find that he acted for some time afterwards in the responsible and confidential situation of a Director or local Manager of the Provincial Bank ; he was also a trustee in the management of some other local charity of private endowment. It may have been therefore natural and proper that the testator should have reposed this trust in a gentleman so circumstanced, relying on his position among his fellow-citizens, his residence in Waterford, and the great probability that he would continue to reside there. Consider now what has occurred in reference to the defendant since the death of the testator. He has confessedly ceased to reside in Waterford ; he has lived with his family for some time in France, and though at present they may be resident in England or in Ireland, I do not find that he has any fixed residence in one country or the other. He has also become a bankrupt. It is alleged, and I believe it to be true, on the evidence of the letter of his assignee under that bankruptcy, that his accounts were correct, and that he made some arrangement satisfactory to his creditors for the settlement of his debts ; but the fact of his bankruptcy is not questioned, and I have not heard any evidence of subsequently acquired property. It is equally unquestionable that he has ceased to hold the office of Director or Manager of the Provincial Bank ; and that he ceased to hold it, under circumstances of grave suspicion, as regarded a large sum of money, to which I do not more particularly allude, because of the unsatisfactory way in which this part of the case is brought forward in evidence, as contrasted with the allegations of the bill ; and I am willing to suppose that the matter is capable of sufficient explanation on the part of the defendant. In his conversation with Mr. Matthews, the secretary of the board, the defendant is sworn to have stated that he and his family lived at Boulogne, and that he had no property in Waterford ; to have spoken about remuneration for his trouble in executing his duty as trustee, and used other language relating to the charity which, though it may have been intended but as boasting of his power of abusing it if he thought fit, without any serious purpose of carrying out such notions, was yet highly calculated to arouse the suspicions of the Commissioners as to

his designs, and at all events is not calculated to give the Court a favourable opinion of his discretion.

Looking to all these matters, and to the views taken by Courts of Equity in reference to trustees, I have no doubt that there is abundant ground in this case, without imputing the least default or misconduct to Mr. Archbold in reference to the funds of the charity up to this period, for the Court's interference in removing him from his trusteeship and placing it in other hands. Sir E. Sugden, in the case *In re Roche* (a), expressly states that a trustee by becoming bankrupt is "unfit to act" in the trusts; and every well drawn settlement contains an express provision for the case of bankruptcy as authorising a change of the trustees. If the Court was to frame a conveyance or scheme for the management of a charity in which trustees were to be appointed, and in which provisions were to be inserted for changing those trustees, can it be doubted that such provision would be similarly expressed? In *Lake v. De Lambert* (b), a trustee was removed because she had married, merely on the ground that it is "very inconvenient" that a married woman should be a trustee; there is in that case the additional circumstance that she had married a foreigner, but it was sworn they intended to reside permanently in England. In *Millard v. Eyre* (c), a trustee was removed, having absconded on a charge of forgery. In *Bainbridge v. Blair* (d), one of three trustees appointed by will was removed on the ground of his bankruptcy, although he had obtained his certificate and the trust property was in the hands of a receiver. I refer lastly to the case of *Uvedale v. Ettrick* (e), where one of several trustees for sale under a will was removed, the other trustee refusing to act with him, though he objected and insisted on being continued; the Lord Chancellor said:—"I like not that a man should be ambitious of a trust when he can get nothing but trouble by it;" and declared that without any reflection on *Ettrick* "he should meddle no further with the trusts."

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(a) 2 Dr. & War. 289.

(b) 4 Ves. 592.

(c) 2 Ves. jun. 94.

(d) 1 Beav. 495.

(e) 2 Ch. Cas. 130.

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I may apply this case to the urgency with which the defendant here resists his removal from this troublesome office. I have no difficulty in arriving at the conclusion that the Court, with reference to the future management and security of this estate, ought to substitute some other trustee in the room of Mr. Archbold.

But it is insisted by the defendant that, even though the Court should take this view of the case, as regards his removal, no such decree can be pronounced in this suit, unless the Court is also satisfied that in point of fact he has concealed, misapplied or withheld the trust funds; that under the statute constituting the Commissioners they are only authorised to sue for charitable funds so concealed, withheld or misapplied, and that if that charge is displaced they have no right to institute a suit for the purpose of removing a trustee on other grounds. The statute is the 7 & 8 Vic. c. 97, and the 12th section is that referred to, which undoubtedly is as stated by the Counsel for the defendant. This part of the case appeared to me to deserve some further consideration, and I was in hopes the defendant might in the meantime be disposed to accede to a suggestion made by the Court, to acquiesce in his removal from the trusts on payment of his costs of the suit. This has not been the case, and it now only remains for me to dispose of this objection to the present suit.

Properly speaking, such a suit as this should be the suit or information of the Attorney-General at the relation of proper parties. The statute, however, has given to these Commissioners a right of suit in certain specified cases, and the question is, whether they have a right, either directly or as necessarily flowing from that conferred on them by the Legislature, to institute a proceeding merely for the removal of the trustees of charity funds on the ground of their unfitness? Now, the object of such a suit is not merely formal, nor is it the punishment of the individuals sought to be removed; the real object and purpose of such a suit are the security of the fund—to take it out of the hands of persons either incompetent to the due and correct application of it, or whom, from their condition, the Court may think it unfit to trust, as having a reasonable apprehension that in consequence of that position the fund may be misapplied,

or at least left to the management of persons whom it does not consider of sufficient responsibility. The Court interferes to guard against the risk of future misapplication. It is clear that in cases of such misapplication taking place, the Commissioners may sue; they have then an interest in guarding against it, and it is their duty to take proper steps for that purpose. Now, I apprehend as a general rule, that any party who is entitled to sue for a fund misapplied may call on the Court to protect that fund against such misapplication, even though I might not hold that within the equity of this enactment a fund may be considered as misapplied if it is in the hands of persons whom the Court thinks unfit to be entrusted with the management of it. It is the principle of bills *quia timet*; and it is well stated in the passage from the "Analysis of the Practice of the Court of Chancery" quoted in the 1st vol. of Mr. Maddock's *Treatise on Equity* (a).

"When a person is apprehensive of being subjected to a future inconvenience, probable or even possible, to happen or be occasioned by the neglect, inadvertence or culpability of another, or where any property is bequeathed to one after the death of another in existence, and which the former is desirous of having secured safely for his use against the effects of any accident which may happen to it previous to the accruing of his possession; in either of these cases a bill of the above description may be exhibited, which in the one instance will quiet the party's apprehension of a future inconvenience, by removing the causes which may lead to it, and in the other will secure for the use of the party the property, by compelling the person in the present possession of it to guarantee the same by a proper security against any subsequent disposition or wilful destruction."

The Commissioners here show that they may be subject to a future inconvenience in the possible loss of part of the rents of this estate, by their being allowed to be received by a person who ought not to be continued as the trustee, and they are the persons who by law may sue for rents so lost; they are thus directly interested

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(a) 1 Mad. Eq. 295, 3rd ed.

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in the subject of the suit, and I think their right to institute such a suit as this, if not directly given in terms by the statute, flows by necessary consequence from the right given to them to proceed for the recovery of the property if actually misapplied at a future period by this trustee.

I may add that substantially, though not technically, the Attorney-General is a party to the proceedings, because the section referred to, which enables the Commissioners to sue, expressly prohibits their doing so without his permission and allowance.

I think therefore that the Court has jurisdiction on this record to declare, and I do declare accordingly, that Mr. Archbold ought to be removed from further acting as trustee in the receipt of the rents of this estate, and that it should be referred to the Master to appoint a new trustee in his room, and that the necessary conveyances should be executed to vest the estate in such new trustee. Mr. Archbold must bring into Court, to the credit of this cause, the sum which on the evidence appears to have been received by him or his agent Mr. Murphy; and an account must be taken of his receipts, &c., and he must bring in the title-deeds, leases, &c.

As regards the costs of this suit, I think the plaintiffs must have their costs of it out of the funds. I give Mr. Archbold also his costs out of these funds, so far as relates to the management of and accounting for the rents since the death of the tenant for life, including the costs of the examination, so far as it relates thereto; but as to the rest of the suit, namely, that which is conversant with the personal objections to his continuing a trustee, he must bear his own costs.

There may be a question on this will, whether Mr. Archbold, though removed as a trustee, is not entitled to retain some rights in the nomination of the objects of the charity; and if this be sought on his part, the decree should protect those rights, as was done in the case of *Ex parte Blackburne (a)*. If it is necessary to have any scheme approved of for the future management of the charity, and a reference is made for that purpose, Mr. Archbold will be at liberty to submit to the Master any privileges of this character to which he

(a) 1 Jac. & Wal. 297.

may be entitled; the order may in that respect be similar to that which was made in *Ex parte Blackburne*: it will direct the appointment of new trustees, and that the objects of the charity shall be nominated and approved of in the manner pointed out by the will in question.

I have read the case of *The Attorney-General v. Wimborne Schools* (a), referred to by Mr. *Baldwin*. It does not, in my opinion, affect this case. The Ecclesiastical Commissioners under the 3 & 4 *Vic. c. 113*, took no interest in any event in the funds which were in question in that case; they had only at the utmost a right, on those funds being ascertained, to suggest a scheme respecting them to the Queen in Council, and therefore they had in respect to them no right to intervene in the case, at least without the concurrence of the Attorney-General as a party to that suit. It appears to me that their position is wholly different from that of the Commissioners of Charitable Donations under this statute.

Reg. Lib. 97, fol. 387, 1847.

(a) 11 *Jurist*, 400.

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By deed (reciting that A was indebted by judgment to X in £3000, and A's inability to pay, and an agreement by X to accept £700 in lieu of the £3000, if punctually paid, to be secured by B) B mortgaged his property to secure the £700; to be payable by instalments at certain times; and the deed provided that if the instalments should not be punctually paid X should be re-mitted to his original rights against A, as well as have the security of the deed for the £700. By a cotemporaneous deed the judgments were assigned to a trustee, for X, in case of default in punctual payment of the £700, and on payment of the £700 for A and B. By a prior deed A mortgaged his property to B for other debts, and as a counter-security. Default was made in payment of the instalments, and the plaintiffs (X's assignee) claimed the entire £3000. *Held*, that although the Court would not interfere for A if the arrangement were between him and X only, yet as the rights of B were involved, the condition in default of punctual payment should be treated as a penalty and relieved against, and this equity could be enforced by A as well as by B.

IN Hilary Term 1824 Joshua Carroll obtained a judgment against Cornelius O'Connor in the penal sum of £1400, and O'Connor subsequently became indebted to Carroll in various sums on foot of bills of exchange and promissory notes, and also in a sum of £750 for money advanced by him to O'Connor. Carroll having died, O'Connor, on the 1st of August 1831, gave a bond and warrant to confess judgment to Sarah Carroll, the widow and executrix of Joshua Carroll, in the sum of £1500, as a security for the last mentioned debt, on which judgment was entered in 1832. And in August 1831 an account was settled between Mrs. O'Connor and Carroll on foot of all the securities, ascertaining a balance of £1747. 18s. 1d. to be due to Mrs. Carroll. O'Connor becoming embarrassed in his circumstances, a negotiation (for a compromise of the amount of these claims) took place between him and Mrs. Carroll and one Francis Twiss, which terminated in a deed executed between these parties on the 20th of March 1840.

By that deed, after reciting the several securities, and that there was then due on them the sum of £3005. 2s. 9d., and that "the said Sarah Carroll applied to the said Cornelius O'Connor for the payment of the said debt, and the said Cornelius having declared his inability to discharge same, or any considerable part thereof, and

having laid before the said Sarah Carroll a full true and correct statement of his affairs and circumstances, she the said Sarah Carroll hath agreed with the said Cornelius O'Connor to take and accept from him a sum of £700 sterling present currency, in lieu and stead and in full bar and satisfaction of the said debt, payable with interest at the rate of £6 per cent., in consideration whereof he the said Cornelius O'Connor hath requested of the said Francis Twiss to further secure the payment of the said sum of £700 and interest unto the said Sarah Carroll, and the said Francis Twiss hath consented and agreed to do so, and hath accordingly as a security therefor and for the payment thereof, proposed to and agreed with the said Sarah Carroll to absolutely grant, release and convey unto her, in and by way of mortgage, all his the said Francis Twiss's interest in the aforesaid town and lands of Ballintauragh and Knockaharin, and all his estate, right, title, interest and benefit of renewal in and to the said towns and lands, and in and to such and every or any part thereof, in manner by these presents, and subject as hereinafter mentioned, and as a further and collateral security therefor and for the payment thereof, he the said Francis Twiss agreed and hath this day executed unto the said Sarah Carroll his bond or obligation with warrant of attorney for confessing judgment thereon, respectively bearing equal date with these presents, in the penal sum of £1400, conditioned for the payment of the sum of £700 on the 12th day of May next ensuing the date of these presents, with interest for the same until paid, at and after the rate of £6 per cent. per annum; and it hath also been agreed upon by and between the said parties hereto, that the said recited judgment so obtained by the said Joshua Carroll against the said Cornelius O'Connor, as of Hilary Term 1824, and the said recited judgment obtained by the said Sarah Carroll against the said Cornelius O'Connor as of Trinity Term 1832, should be assigned unto Henry Noblett of the city of Cork, attorney-at-law, as a further and collateral security with these presents for the payment of the said sum of £700 and interest, and which said judgments are by indented deed of assignment, bearing equal date herewith, duly assigned unto the said Henry Noblett accordingly." It was witnessed that "In pursuance

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and part performance of the said recited agreement, and in order the better to secure the payment of the said sum of £700 with interest, which the said Sarah Carroll hath agreed to accept, and doth hereby declare the same to be in lieu and place of the said sum of £3005. 2s. 9d., and in full bar and satisfaction thereof, upon the punctual payment of said sum of £700 and interest in manner hereinafter mentioned, and for the considerations aforesaid," the said Francis Twiss, at the request of the said Cornelius O'Connor, did charge and incumber his estate and interest in the lands of Ballintauragh and Knockaharin with the payment of the said sum of £700 and interest, subject to redemption, and he thereby granted those lands in mortgage to Sarah Carroll, her heirs, &c., subject, in addition to the usual proviso for redemption on payment of £700, to the following:—"Provided further, and these presents are upon this express condition, and it is the true intent and meaning thereof and of the parties hereto, and so she the said Sarah Carroll doth hereby for herself, her executors, administrators and assigns, covenant, promise and agree to and with the said Cornelius O'Connor and Francis Twiss and each of them, their and each of their heirs, executors, administrators and assigns, in manner following—that is to say, that if they the said Cornelius O'Connor and Francis Twiss or either of them, their or either of their heirs, executors, administrators or assigns, or any or either of them, do and shall well and truly pay or cause to be paid unto the said Sarah Carroll, her executors, administrators or assigns, the said principal sum of £700 with interest at the rate aforesaid, and all costs that may be due on foot of these presents and the securities collateral therewith, by instalments in and after the manner following—that is to say, the sum of £200, part thereof, with the interest of the entire of said principal sum, on the 12th day of May 1840; £200 more, one other part thereof, and the interest thereof, and of the residue of said principal, on the 12th day of May 1841; £200 more, one other part thereof, with the interest thereof, and of the other residue of the said principal, on the 12th day of May 1842; and the sum of £100 being the residue and remainder of the said principal sum of £700 with the interest of said remainder, and

all such costs as aforesaid, on the 12th day of May 1843—she the said Sarah Carroll, her executors, administrators and assigns, shall and will, notwithstanding any thing hereinbefore contained to the contrary thereof, accept and take payment and satisfaction of the said principal sum of £700, interest and costs accordingly; provided also, that if default shall be made in the payment of the said first or any successive instalment of the said principal sum of £700 and interest as and in manner hereinbefore mentioned, then and thereupon the said Sarah Carroll, her heirs, executors, administrators and assigns, shall, notwithstanding any thing hereinbefore contained, have all the rights and remedies by foreclosure or otherwise of a mortgage in ordinary case for the recovery of the said principal sum of £700 and interest, or so much thereof as shall remain then unpaid, and all costs, charges and expenses occasioned by the non-payment thereof or otherwise; and that in case of any such default or defaults as aforesaid, she the said Sarah Carroll, her executors, administrators and assigns, shall have, concurrently with the powers and authorities herein contained, all the rights, powers and authorities which she now hath, or immediately before the execution of these presents had, for recovery of the said debts so due to her as aforesaid by the said Cornelius O'Connor."

By a deed of the same date, to which O'Connor and Twiss were parties, the two judgments were assigned by Mrs. Carroll to H. Noblett "upon trust, in case default shall be made in the payment of any or either of the instalments of the said principal sum of £700 and interest, as provided by the said deed of mortgage, in manner and on the respective days and times in the said deed of mortgage mentioned and appointed for the payment thereof respectively, then and upon each or any of such events happening, that he the said Henry Noblett, his executors, administrators or assigns, do and shall, at the request in writing of the said Sarah Carroll, her executors or administrators, forthwith proceed for the recovery of the full amount of the said respective judgment debts, and without any prejudice whatsoever to the validity of the said deed of mortgage, as a security for the aforesaid principal, interest and costs so secured thereby, or intended so to be, or for so much thereof as shall not have been paid;

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the amount of which said judgment debts, when so recovered, or so much thereof respectively as shall be so recovered, to be handed over and paid unto the said Sarah Carroll, her executors or administrators; and upon this further trust, that upon full payment and satisfaction of the said principal sum of £700, interest and costs, in the manner and at the times mentioned in the said indented deed of mortgage, he the said Henry Noblett, his executors, administrators or assigns, do and shall, at the request, costs and charges of the said Francis Twiss, his heirs, executors or administrators, but nevertheless with the consent in writing of the said Sarah Carroll and Cornelius O'Connor respectively, or their respective heirs, executors, administrators or assigns, assign and make over the said recited judgments unto the said Francis Twiss, his executors, administrators and assigns."

Previous to the execution of these deeds O'Connor had assigned to Twiss, by a deed of April 1839, his interest in the lands of Carker and Inchicummer for certain purposes, and, amongst others, to counter-secure Twiss against any loss or liability on foot of the mortgage and judgment granted by him to Mrs. Carroll.

On the 29th of April 1840, a sum of £100, of which £31. 15s. was for costs, was paid to Mrs. Carroll on foot of her demands; and no further sum having been paid, she filed her bill on the 30th of October 1841 against Carroll, Twiss and others, praying that she might be decreed to be entitled to be paid all the sums at any time due by O'Connor, with all accumulations of interest and costs, and that in default of payment, the mortgage of 1840 might be foreclosed, and for a sale of the lands included in it; and also praying a sale of certain lands belonging to O'Connor, which had been equitably mortgaged to her to secure the several sums so due, by a deposit of the title-deeds in April 1826.

On the 20th of November 1841, a further payment of £150 was made to Mrs. Carroll.

The bill was taken as confessed against O'Connor and Twiss on the 14th of June of 1842; and a decree to account was made on the 5th of November 1842.

In November 1843 Mrs. Carroll, for the consideration of £580,

assigned all her claims on foot of the several securities to one John Busted for his own benefit, and agreed that he was to be at liberty to carry on the suit and proceedings in the name of her or her representatives.

Mrs. Carroll died early in 1844, having by her will left all her property, real and personal, to the plaintiffs in the second cause; and in March 1844 Busted filed the bill of revivor in that cause in their names.

The Master made his report on the 1st of August 1846, and thereby found, amongst other things, "that, according to the true construction of the said indenture bearing date the 20th of March 1840, the agreement entered into by the said Sarah Carroll to accept from the said Cornelius O'Connor the sum of £700 in lieu of the larger sum which he then owed her, was conditional on the punctual payment of the said sum of £700 by instalments on the days and in the manner as provided for by said deed of mortgage; and that default having been made as aforesaid in payment of the second instalment of said sum, the said Sarah Carroll immediately thereupon became entitled to resort to all the securities held by her prior to and at the date of the said mortgage, for the recovery of the full amount due on foot of such securities, less by the sum of £218. 15s. so paid, as fully and effectually as if the said deed of mortgage had never been executed, without prejudice however to her rights under the said deed." The Master then found the sums due to the plaintiffs on the several securities, amounting in the whole to the sum of £3233. 3s. 9d., and that the said sums were further secured by the equitable mortgage of the 6th of April 1826, and deposit of the lease contemporaneous therewith; and he found that the mortgage of the 20th of March 1840, affecting the lands of Ballintauragh and Knockaharin, the property of the defendant Francis Twiss, was a further security for the sum so due to the plaintiffs, to the extent of the sum of £698. 19s., being the sum found to be due on the mortgage, for principal and interest up to the date of the report.

To this report O'Connor filed several exceptions, insisting principally that the Master ought to have found that according to the true

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construction of the deed of the 30th March 1840, the agreement entered into by Mrs. Carroll to accept £700 in lieu of the larger sum was absolute and unconditional, and that upon default having been made in payment of the second instalment, she did not become entitled to resort to the original securities for the recovery of the full amount, or for any greater sum than the balance due on foot of the £700; and further, that even supposing she had been, at the filing of the original bill, entitled to recover the full amount on foot of the several securities, yet by accepting the sum of £150 in November 1841, after the filing of her bill, she had waived and lost that right.

Twiss also excepted to the report, on the ground that the Master declined to enter into an account of what was due to him by O'Connor under the deed of April 1839.

On the 31st of March 1846, O'Connor filed the bill in the third cause, being a cross bill, setting forth fully the arrangement between O'Connor and Twiss, and also that between Mrs. Carroll and O'Connor, and charging that upon the negotiation between the two latter, previous to the execution of the mortgage of 1840, it was distinctly understood and agreed upon that she should unconditionally take the sum of £700 and interest, in lieu and full satisfaction of all her demands, and relying on the acceptance of the £150 by Mrs. Carroll after the filing of her bill as a waiver of her right to recover the full amount of the several securities, if any such right she had; and praying that the plaintiff might be entitled to the benefit of the compromise and abatement, on payment of the sum which should be found to be due on the mortgage for £700, and that thereupon the plaintiffs in the second cause might re-convey to him the several original securities.

The second cause now came on to be heard on the exceptions to the Master's report, and the third cause on pleadings and proofs.

Argument. Mr. Brewster, Mr. O'Brien and Mr. Leahy, for O'Connor.

First. They contended that, from the provisoes in the deeds of mortgage and assignment of the judgments taken together, the mortgage was an absolute composition of all the former securities for the sum of £700, and not conditional upon the punctual payment of the instalments.

Secondly. That if the payment of the instalments was a condition precedent, so that a default would work a forfeiture, this Court would look upon it as in the nature of a penalty, and give the parties relief against it: *Wallis v. Crimes* (a); *Hayward v. Angell* (b); *Hollinrake v. Lister* (c); *Rose v. Rose* (d).

Thirdly. That this was in the nature of a composition; and though the conditions might not have been strictly complied with it would be an injustice to Twiss to allow Mrs. Carroll to recover the full amount off the lands equitably mortgaged by O'Connor to her, and which were also the counter-security to Twiss: *Mackenzie v. Mackenzie* (e); that this was not the case of a voluntary bounty on the part of Mrs. O'Connor, in which case the terms should be strictly complied with: *Rose v. Rose* (f); but she obtained the additional security from Twiss.

The *Attorney-General*, The *Solicitor-General* and Mr. *Robert Longfield*, for the plaintiffs in the second cause, and for Busted.

They submitted, in the first place, that the cross-bill should be dismissed with costs, inasmuch as the relief sought by it could be obtained by Carroll upon his exceptions in the second cause, if the Court should consider him entitled to it; and the decree in the first cause could not be now impeached collaterally: *Ogilvie v. Herne* (g).

Upon the effect of the deeds they argued—

First. That from the recitals and operative parts of the mortgage deed of 1840, the arrangement to take the sum of £700 was altogether dependent on the performance of the conditions.

Secondly. That this was not the case of a penalty, nor of a mere condition precedent, against which equity could relieve.

Thirdly. That the exceptions in favour of a voluntary composition deed, mentioned in the case of *Rose v. Rose*, could not be relied on in this case by O'Connor, as Twiss was not a plaintiff

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(a) 1 Cha. Ca. 89.

(b) 1 Vern. 222.

(c) 1 Rus. 500.

(d) Amb. 331.

(e) 16 Ves. 372.

(f) *Ubi sup.*

(g) 13 Ves. 563.

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in the cross cause, and there was no equity in favour of O'Connor; and that this case came within the general rule of equity, as laid down by Lord Hardwicke in *Ex parte Bennet* (a)—namely, that the Court will not dispense with the point of time in compositions, but where a creditor agrees to take less than his debt provided it be paid precisely at the day, and the debtor fails in payment, he cannot be relieved. *Ex parte Vere, In re Palmer* (b).

Mr. Serjeant *Warren* and Mr. *Lawson*, for Twiss.

They insisted that the Master was bound to enter into the account required by him: *Sullivan v. Delany* (c).

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The LORD CHANCELLOR.

It is not very plain what the object of the parties in this case was. Their primary object was this, as I collect it from the deeds: Mrs. Carroll says that O'Connor laid before her a true and correct statement of his condition; and she in consideration agreed to abate a large portion of her demand, on certain terms, and provided those terms were punctually observed. If the case rested there it would be very simple; they should abide by the condition strictly, and Mrs. Carroll would be entitled to rely on the deed, according to the cases in bankruptcy which were cited.

But there is more in the case; for there was a new consideration given—viz., the concurrence of Twiss, who mortgaged his estate for £700, the sum to which Mrs. Carroll agreed that her debt should be reduced. He had in 1839 obtained securities from O'Connor, and it was important to him to reduce Mrs. Carroll's demand. It may be said, therefore, that he does not stand altogether in the condition of a mere surety, but of a person also getting a benefit by cutting down the demand of Mrs. Carroll. That so far distinguishes this case from those cases where a surety comes forward merely as surety and having no interest of his own in the matter. It does not, however, distinguish it substantially from the case of

(a) 2 Aff. 527.

(b) 1 Rose, 281.

(c) 6 Ir. Eq. Rep. 370.

Rose v. Rose (a). He does, in fact, become a party to the conveyance to Mrs. Carroll, and mortgages his own estate to secure Mr. O'Connor's debt to her, at the abated amount of £700.

On the construction of the deed, I think the Master has come to the right conclusion; that is, that taking the whole together, Mrs. O'Connor was remitted to, and entitled to insist on, her original rights, on non-payment of the instalments. At the same time, there are many expressions which are not very consistent with this view; and the deed is not so clear as one would wish. It might have been more distinct. The condition she insists on is punctual payment. I think the words of the proviso are sufficiently plain to give that right; and I could not, as between her and O'Connor, if no interest intervened, deprive her of the benefit of that construction.

The question then arises, what is to be done? One instalment was paid, another was unpaid, and then she filed her bill. I must put out of view the subsequent acts of the parties. She was willing to take the £700 if she got it; but it was not paid in her lifetime. It was imprudent not to pay it; it is stated in the evidence that she was, as I have said, willing to take it, and all she did get in money is secured by this deed. The acts of the parties, however, cannot put a construction on the deed. I say nothing of Busteed's purchase. That transaction I am not called upon to give an opinion upon, though I may say I cannot speak of it with approbation. The real question is, can I give relief as between Mr. O'Connor and Mrs. Carroll?

There is a distinction between this and compromises where a third party joins as security, on the ground I have stated. There is a clear equity for Twiss, and he, at all events, may insist that the conditions of the deed are not to be so rigorously enforced as to damage his rights.

In *Delamere v. Smith* (b) the distinction is expressly alluded to between a voluntary arrangement by two persons only, and a case where a third person intervenes. In the latter case the arrangement

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(a) 1 Cha. Ca. 110.

(b) 1 Amb. 331.
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is to be treated as no longer of a merely voluntary character, and rights are given which would not flow from a simple contract between the two persons only. It is there stated, "In this case part of the consideration of the agreement was, that Tubbing (who was not obliged by any former security) had paid Smith £70, and undertook to pay him £40 more; so Smith bettered his security." That is, it was not a mere voluntary arrangement between debtor and creditor. I observe a very old manuscript note to that case,* stating that Lord Hardwicke considered this distinction to be the just one in *Rose v. Rose*. I do not place any dependence on that note, though I think it not improbable that it is correct. The same words do not appear in the report of the case of *Rose v. Rose* in *Ambler* (a), but they agree with the tenor of the case as there given. Lord Hardwicke is there made to say, "It appears to me that the son made a conveyance of this estate to his father, and was afterwards induced to enter into the articles by reason of the abatement. Broadrip (a witness) swears that Thomas Rose (the creditor) said if any method could be found to discharge the debt he would abate a part of it, so that an abatement was thought of at the beginning. Immediately after the son came of age he conveyed the estate to his father (the debtor): after that, the abatement being reduced to a certainty, the son entered into these articles. The whole was one treaty and transaction. This case is within the determination in *Delamere v. Smith*, and the plaintiff is entitled to be relieved under these circumstances on making a compensation." The plaintiff there was the son who had not been a party to the mortgage, which was entered into to the defendant, but who had previously conveyed his estate in remainder to his father to enable him to pay his debts; but the three, that is, the mortgagee and the father and son, were considered

(a) 1 Amb. 331.

* His Lordship read this memorandum from a copy of *Chancery Cases* in the Four Courts Library. It is as follows:—"Vide *Rose v. Rose* (16 9ver. 1756), by Lord Hardwicke, where it is said the distinction here taken is a just one." The writing is very old, but it does not appear to whom the copy belonged.

as having in substance entered into the arrangement (relief against a breach of which was sought), "it being the intention of Thomas Rose (the mortgagee), in case the terms be truly observed and performed, to abate £500 in part of the said debt." It would seem that the person filing the bill there was not the debtor but his son entitled in remainder, who had been the additional security for the abatement. It does not indeed appear by the report whether on his father's death he took as his heir-at-law or under the original limitations, and if he took as heir-at-law, he would stand in the place of the debtor and not of the security. Lord Hardwicke, by referring to *Delamere v. Smith*, shows however the grounds of the decision, and that it did not go on the opinion that no other person but the surety could take advantage of the equity, but, on the contrary, that it was equally open to the debtor himself. Where another person joins in such an arrangement he usually takes a counter-security or relies on the solvency of the debtor, resulting from the relief thus obtained, and nothing should be done by the creditor to affect that security. That principle was acted on in the Exchequer in Ireland in a case at law, where it was argued that no one but assignees in bankruptcy could insist on the right to relief against a fraud on a composition deed (a); the Court held that the debtor who had paid to a creditor a sum to procure his signature to the composition deed could himself recover it back; that it was a fraud on the third parties, creditors, who had come into the arrangement, and did so, perhaps, relying on this right; and that any thing which would lessen this security should not be permitted.

It is quite plain that Twiss would be seriously damnified by these judgments being enforced against the estates, and the doctrine of strictly enforcing the conditions of the deed must be pushed thus far, that if one penny was unpaid on the last day, it would entitle Mrs. Carroll to recover the whole debt as against Twiss. I think this cannot be; and I think also that the equity claimed exists and may be enforced as well in favour and at the suit of the principal as of the surety. The proposition alluded to

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(a) See *Hely v. Hicks*, 3 Ir. Law Rep. 92.

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in *Delamere v. Smith*, and approved of by Lord Hardwicke, does not make any distinction between them; it shows, I think, that all persons affected by the arrangement would have the same equity, and that the debtor himself has a right to claim the benefit of it. It is the general course of the Court to relieve against a penalty, and the exception to that is where the transaction to which the penalty is attached is purely voluntary.

The general rule is laid down in *M'Kenzie v. M'Kenzie (a)*. That was a case, not of a surety, but of joint and several bonds given by the plaintiff and his partner to the defendant, who afterwards agreed with the plaintiff's other creditors to a composition, payable by instalments, secured by promissory notes; the Court held that the creditor was not entitled to enforce the bonds on non-payment of the instalments, and that no one creditor could, because his instalments remained unpaid, recover his entire debt. That equity was there enforced at suit of the debtor himself, thus confirming the doctrine of *Rose v. Rose* and *Delamere v. Smith*. The case in the Exchequer proceeds on the same doctrine, viz., that this equitable right may be enforced by the debtor himself.

Here the circumstances are strong. The provisions were made in substance for the benefit of all parties, and the mortgage, by Twiss coming into the arrangement, was a sufficient consideration to take the case out of that of a voluntary deed and bring it within that class of authorities in which the Court relieves against penalties.

I avoid acting on any impression I may have formed respecting the transaction with Busteed, and without reference to that, I think I have authority to give relief.

I will not dispose of the case finally now, but I have stated my present opinion. I do not think any cross-bill was necessary. Mr. O'Connor must pay the costs; the suit was caused by the negligence of him and his advisers. It is in the nature of a redemption bill, and even if it were not altogether unnecessary, he must pay the costs of it. I must overrule the exceptions, and I will

(a) 16 Ves. 372.

make a declaration in the decree that Mr. O'Connor is entitled to the equity claimed by the cross-bill.

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The LORD CHANCELLOR continuing of the same opinion, a decree was made, overruling the exceptions taken by Cornelius O'Connor in the first and second causes, without prejudice to his rights in the third cause and the declarations made in respect thereof. The decree then, after disposing of some exceptions taken by Twiss, and before the usual directions for payment or a sale in default of payment, contained the following:—

Declare that Cornelius O'Connor, the plaintiff in said third cause, is entitled to the benefit of the compromise and abatement in the pleadings mentioned: and accordingly, that the judgments, bills of exchange and promissory notes set forth in the first schedule to the said Master's report of the 31st day of July 1846 and the equitable mortgage of the 6th of April 1824 in said report are securities only to the extent of the sum of £701. 9s., by said report and the second schedule thereto found to be due at foot of said indenture of mortgage of the 20th day of March 1840, and the further interest on so much thereof as is principal money, from the 1st of August 1846, being the day to which interest is calculated by said report; and that said sum of £701. 9s., with such further interest as aforesaid, is also further secured by said mortgage of the 20th of March 1840; and that same is a charge upon the several lands and premises in the pleadings mentioned, which were comprised in said equitable mortgage of the 6th of April 1824, and in said mortgage of the 20th of March 1840.

Decree.

Reg. Lib. 96, fol. 161, 1847.

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When a statute in giving a new right also prescribes the mode of enforcing it, no other remedy can be pursued.

Therefore sums to be repaid by succeeding incumbents for glebe improvements can be recovered only by distress, &c., as pointed out by stat. 10 W. 3, c. 6; and though several Acts amending that statute speak of these sums as charges, none of them create any claim against the benefice which can be recovered by bill in equity.

The incumbent of a benefice under sequestration was liable to repay instalments for glebe improvements to his predecessor's executor: sums were also ascertained under a commission as due for dilapidations in the

time of the predecessor, which were to be set off under stat. 12 G. 1, c. 10. *Semble*, the Bishop could require a moiety of the income received by the sequestrator to be deducted for the dilapidations; but *semble*, the right of set off is connected with the liability to repay the instalments, which did not apply to the first year's income, and therefore no deduction should be made from it.

THE bill in this cause was filed by the personal representative of the Rev. John Young, who had been rector of the parish of Killeshall, in the Archdiocese of Armagh, in order to establish a charge upon the emoluments of the parish for repayment of the sums paid by him to his predecessor in respect of improvements on the glebe, under the following circumstances.

The Rev. D. Kelly had been in 1817 rector of the parish. He had expended a sum of £2037. 12s. 11d. in building on a new site a dwelling-house and other improvements on the glebe. The expenditure had been duly certified by Commissioners and approved of by the Primate, as required by the statute 10 W. 3, c. 6, and the Acts amending it; and the amount ascertained as that to be repaid by the succeeding incumbent was £1698. 9s.

The Rev. D. Kelly died in 1818. The Rev. John Young was his successor in the benefice, and had paid this sum of £1698. 9s. to his executrix. Young had continued rector of the parish until his death in 1844, when his executrix became entitled under these statutes to be repaid £1175. 15s., being two-thirds of the amount paid by him. The defendant, the Rev. Richard Nugent Horner, was duly inducted as Young's successor, and thereupon became liable to pay that sum. The executrix of Young had since died, and the plaintiff was her executor. A moiety of the sum, amounting to £587. 18s. 6d., became payable on the 21st of August 1845, being one year after Young's death, and two other instalments of £293. 19s. 3d. each became payable at intervals of six months after that.

On the 15th of November 1844, the Rev. R. Horner was discharged as an insolvent.

On the 8th of November 1844, R. H. Mills and F. N. Mills, executors of Francis Mills deceased, lodged a sequestration, which was duly published, on foot of a judgment recovered against Horner in the Common Pleas for £367. 15s. G. Wilcocks was appointed sequestrator. Soon afterwards there were several other sequestrations lodged at the suit of various other judgment creditors of Horner, to a very large amount.

In March 1846 the plaintiff presented a petition to the Primate, praying a sequestration to pay £881. 17s. 9d., being the amount of the two first instalments which were then due to him. R. N. Horner also applied to the Primate for a commission to inquire into dilapidations of the glebe and offices during Young's incumbency.

In 1846, R. H. and F. N. Mills required a return to the *levari* on their judgment. The Primate returned a certificate stating that, by virtue of the writ of *levari facias* delivered on the 8th of November 1844, he caused the benefice of Killeshall to be sequestered, and appointed Wilcocks sequestrator, who had received the emoluments to the amount of £566. 4s. 2½d., the balance of the half year's rent and rent-charge due to November 1845, the half year's rent-charge due in May 1846 not having been as yet collected; that the sequestrator had paid several necessary deductions and payments thereout, amounting to £265. 4s. 5½d., the particulars of which appeared by the schedule annexed; that there was in the sequestrator's hands £300. 19s. 9d. ready to be paid to the person entitled; but that a sum of £1175. 17s., a charge on the benefice, was due to Thomas Brooke (the plaintiff), personal representative of the Rev. John Young, on account of buildings and improvements on the benefice, of which two instalments amounting to £881. 17s. 9d. became due on the 21st of February then last; that that sum not having been paid, Brooke, on the 24th of March 1846, presented his petition praying the Primate to sequester the benefice until that sum and the remaining instalments which would become due on the 21st of August then next, with all costs, should be paid, and that such sequestration should have priority over all other sequestrations, or that

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the Primate should order Wilcocks to pay the petitioner in priority to all other debts of the Rev. Richard Horner, one moiety of the rents and emoluments of the rectory; and the certificate then proceeded: "Which petition having come on to be heard in our Consistorial Court of Armagh, it was ordered on the 25th day of March 1846, that said sequestrator should pay to said petitioner Thomas Brooke, in priority to any debts of said defendant, the excess of the said hereinbefore mentioned sum of £881. 17s. 9d. subject to a deduction for the amount of dilapidations on the glebe-house and offices of Killeshall, when ascertained under a commission of dilapidations about to be issued by me as Archbishop of Armagh, pursuant to the statute in such case made and provided. And I further certify, that a commission having accordingly been issued, and the Commissioners having reported and ascertained that dilapidations had been suffered on the glebe-house and premises to the amount of £235. 1s. 8d. by the late Rev. John Young, which was allowed by me, it was by a further order of our said Court, bearing date the 15th of April 1846, ordered that the said sequestrator should pay to the said Thomas Brooke the sum of £598. 16s., being the balance remaining after deducting said sum of £235. 1s. 8d." The certificate further stated, that no part of that sum was paid to Brooke, and "that the glebe-house and offices of said benefice are in a dilapidated state, and that the said sum of £235. 1s. 8d. will be required to be expended in repairing same." The schedule contained the sequestrator's account, which showed the balance of £300. 19s. 9d. in his hands, after certain deductions, the heaviest of which were the expenses of the commission of dilapidations.

In November 1846 R. H. Mills and F. N. Mills applied by motion to the Court of Common Pleas, that the Primate or sequestrator should pay over to them the sum of £300. 19s. 9d., and should pass his account. The plaintiff applied by cross-motion for payment of the money to him. The matter was debated, and an order made on the 14th of January 1847 for payment to R. H. and F. N. Mills of the entire sum, and that out of the sums received since the date of the certificate and the sums thereafter received by the sequestrator he should pay them the costs of the motion, and that the Primate should

retain his costs on passing the sequestrator's next account: and no rule was made on the plaintiff's cross-motion.

The bill in this cause was filed in December 1846. It prayed that the above-mentioned sum of £1175. 17s. might be declared a valid charge on the rectory of Killeshall, and to be the first incumbrance thereon, in priority to all the claims of all other creditors of Horner; and prayed an account on foot of that sum, and the other incumbrances, and accounts of the emoluments of the benefice and of the sums received under the sequestrations; and that the sum in the sequestrator's hands should be brought into Court, and a receiver be appointed, and an injunction issued to restrain the payment over of the £300. 19s. 9d. or further proceedings in the Common Pleas.

In January 1847 the plaintiff moved for an injunction and receiver at the Rolls, and the Master of the Rolls made the order applied for. The motion at the Rolls is reported *ante*, vol. 10, p. 305.

The executors of Mills now moved, by way of appeal, to discharge the order of his Honor the Master of the Rolls. The money had, in the meantime, been invested in £320. 19s. 4d. Government stock, to the credit of the cause.

Mr. *Butt*, for the appeal, argued that there was no power to recover any part of the expenditure for building, except under the statutes; that whatever obligations in the nature of outgoings were necessary to be met by an incumbent were always noticed by a Court of Law in giving effect to an execution: *Whinfield v. Watkins* (a); *Baker v. Swayne* (b); that the statute 10 *W.* 3, c. 6, gave only the specific remedies mentioned in it, and created no equitable charge on the benefice; and the statutes 12 *G.* 1, c. 10, and 9 *G.* 2, c. 13, and all the subsequent Acts on the subject, dealt with the rights of succeeding incumbents only as created by that first statute, and always treated the demand as a personal charge against the incoming incumbent, and not as a lien on the benefice; that therefore there was no remedy whatever in equity; that the ordinary rule

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(a) 2 Philim. 1.

(b) Jo. & Car. 231.

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that sequestration creditors have priority according to the dates of the publication of their sequestrations applied, and the plaintiff could establish no priority; and that this in fact had been so decided by the Common Pleas, which was the proper tribunal. He referred to statutes 3 & 4 *W.* 4, c. 90, and 43 *G.* 3, c. 106, as showing that the Legislature, when it created a charge on a benefice, did so in express terms; and distinguished *White v. Bishop of Peterborough* (a), as turning on quite different circumstances. He also cited *Cuddington v. Withy* (b), and *Morrogh v. Hoare* (c).

Serjeant *Warren* and Mr. *S. B. Miller*, in support of the Rolls order.

They argued that the statute 10 *W.* 3, c. 6; contemplated the recovery of these advances out of the profits of the benefice, and thereby made them a charge in equity on the benefice; that the several sections of the subsequent statutes, 12 *G.* 1, c. 10, 9 *G.* 2, c. 13, 11 & 12 *G.* 3, c. 17, 31 *G.* 3, c. 19, 40 *G.* 3, c. 82, 3 & 4 *W.* 4, c. 37, and 4 & 5 *W.* 4, c. 90, in which expressions describing these payments as charges are used (and which are referred to in the judgment), corroborated this construction, or were sufficient in themselves to create a charge in equity; that it would be an unnatural construction to treat an expenditure, which substantially benefited the living itself, only as a personal demand against an incumbent, who might possess the living only for a short time, and allow the demand against it to be overreached by all his other debts, thus in fact rendering it impossible to be recovered in cases like the present, where a man deeply embarrassed was appointed to the benefice; that if the sum due to the plaintiff was an equitable charge, it must take priority over the claims of all Horner's judgment creditors, as it would attach on the instant of his nomination to the benefice and, as he would take the living only subject to it, his creditors could have no higher right; and they relied on the Primate's order as having effect by

(a) 3 Swanst. 109.

(b) 2 Swanst. 174.

(c) 5 Ir. Eq. Rep. 195.

relation so as to overreach the prior sequestrations. As to the effect of the certificate and rights of sequestration creditors and priorities of equitable and legal demands, they referred to *Baker v. Swayne* (a); *Graves v. Murray* (b); *Metcalf v. Archbishop of York* (c); *Whitworth v. Gaugain* (d); *Langton v. Horton* (e); *Stronge v. Ormsby* (f); and submitted that Mills could, regarding the dilapidations, attach only the May gale of rent-charge due in 1845, minus deductions. They also argued that this, being a grave question of law, would not be decided on an interlocutory motion.

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Mr. *Lawson*, in reply, argued that none of the Acts relied on created or recognised any equitable right; that the charge, if any, on the benefice, would be a legal charge; that the only statute, in fact, which made the advances recoverable at all, was the statute of *W. 3*; and that, as that Act created the right and prescribed the remedy at the same time, no other remedy than those pointed out by it, viz., distress, sequestration, or an action of debt, could be pursued; that the questions of priority should be decided, in passing the sequestrator's account, at law: *Waldron v. Garrett* (g); and equity would not interfere; *Bateman v. Willoe* (h); *Harrison v. Nettle-ship* (i). He also argued on the analogy of conflicting claims in case of a bankruptcy, or adverse claims between the Crown and a subject under executions, as showing that the plaintiff should be postponed to the prior sequestration; and for this part of the argument cited *The King v. Wells and Allnut* (k); *Giles v. Grover* (l); *Attorney-General v. Andrew* (m); *Williams v. Craddock* (n); *Marsh v. Fawcett* (o); *Parslow v. Dearlove* (p); *Burne v. Robinson* (q).

(a) *Ubi sup.*

(c) 1 My. & Cr. 547.

(e) 1 Hare, 549, 560.

(g) Jo. & Car. 69.

(i) 2 M. & K. 423.

(l) 9 Bing. 128; S. C. 2 M. & Sc. 197; S. C. 1 Cl. & Fin. 72.

(m) Hard. 23.

(o) 2 H. Bl. 582.

(b) Ha. & Jo. 165.

(d) 3 Hare, 416.

(f) 2 Hog. 55.

(h) 1 Sch. & Lef. 301.

(k) 16 East, 278, n.

(n) 4 Sim. 313.

(p) 4 East, 438.

(q) 7 Ir. Eq. Rep. 188.

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He also relied on the fund in question having been realised by the diligence of the sequestration creditor: *Thomas v. Brigstocke* (a): and submitted that the point was a proper one to be decided on this motion, or if not decided, that the order for an injunction, &c., should not be made.

The LORD CHANCELLOR inquired if the Primate had notice of this application; and the motion stood over for consideration, and to allow the Primate to intervene, if he desired to be heard.

Mr. *Wall* afterwards appeared for the Primate.

Feb. 20. The LORD CHANCELLOR (after stating the facts of the case) said:—

Judgment. The principle which in my opinion is applicable to this case was discussed in *Bently v. Hastings* (b). The precise question there raised was, whether an action was maintainable in the Superior Courts by the assignee of a civil bill replevin bond given under the 13th section of the 6 & 7 W. 4, c. 75. The Court of Queen's Bench held that it was not; and that the remedy and right being given by the same section of an Act of Parliament, the right could not be enforced otherwise than in the manner pointed out by the Act. That decision was brought before the Exchequer Chamber, where the case was fully argued; and that Court held that the decision of the Queen's Bench was correct, and that the remedy pointed out by the statute was the only one which could be taken on such a bond. I was a member of the Court of Exchequer Chamber when that case was decided, and I differed in opinion from some of the other Judges, not on the general question, but because I thought that should not be the ground of our decision; for there are other statutes relating to replevin bonds, and I considered their provisions applicable to the case, and those of the Civil Bill Act therefore cumulative. Some of the other Judges were inclined to

(a) 4 Russ. 64.

(b) 8 Ir. Law Rep. 166.

agree with me in that view. We were however unanimous as to the ground on which the case was decided, viz., that supposing the other statutes I have alluded to not to apply to the bond in question, the remedy and the right being given together, the latter could be enforced only in the manner in which it was so prescribed. The case of *The Dundalk Railway Company v. Tapster (a)* was still a stronger case. That was an action of debt, for calls on railway shares, and the action was brought in England, but by the Act incorporating the Railway Company the calls were to be enforced by the Courts in Ireland; and though there was there a clear debt, yet the Court of Queen's Bench in England held that the remedy was plainly confined to the specific course of proceeding pointed out in the Act. There are some other decisions respecting proceedings of a minor character, *ex. gr.* proceedings before Magistrates, which I do not refer to, though they affirm the same principle.

Applying then this doctrine to the present case:—This is a demand first created by the statute 10 W. 3, c. 6. The first section of that Act of Parliament, and that section alone, contains the sole provision to be found in the entire code enabling the preceding incumbent of an ecclesiastical benefice, or his representative, to recover the proportion of the expenditure on a glebe from his successor. Thus the remedy and the claim are clearly created in the same section. The remedies there given are expressly defined; the repayment is to “be recovered by the party who ought to receive the same, his executors or administrators, either by distress on any of the lands or tenements of such archbishoprick, bishoprick, living or benefice belonging to the successor hereby obliged to pay the same, or by sequestration of one moiety of the rents and profits of such see or benefice,” which sequestration is to be made by the persons specified, “or by action of debt in any of his Majesty's Courts of Record in this kingdom.” The remedies specified are thus distress, sequestration, or an action of debt; there is not a word of any remedy in equity. It is a plain legal demand, with legal remedies and an ecclesiastical remedy. The Act not

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(a) 1 Gale & Dav. 657; S. C. 1 Ad. & El. N. S. 667.

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having said that the remedies shall be carried further, it is enough for me to say that, on the doctrine I have referred to, I cannot carry them beyond what are there given.

The statutes 12 *G.* 1, c. 10, 9 *G.* 2, c. 13, 11 & 12 *G.* 3, c. 17, 13 & 14 *G.* 3, c. 27, and 4 & 5 *W.* 4, c. 90, do not appear to me to have any thing in them to affect this view of the question. It is occasionally said that certain claims are to be charged on the lands or benefice; but there is no declaration that the sum to be certified as payable by a succeeding incumbent, under the statute of *W.* 3, is to be charged in any other sense than as it is charged under that, which is the first Act upon the subject. Down to the very latest of these statutes it is spoken of as a demand to be recovered from the successor of the incumbent who builds. The statute 12 *G.* 1, c. 10, in the first section speaks of certificates given by virtue of the previous Act, "for any sum or sums of money to be charged upon any archbishoprick, bishoprick or other ecclesiastical living," and directs what the certificate shall contain respecting the value of the benefice; but it does not declare that any one shall have a charge on the benefice itself: on the contrary, in the following section, it directs that each incumbent shall recover the sums mentioned from his immediate successor, using the words "shall have and receive" or "shall receive" from his immediate successor the proportions of the sums certified. In statute 9 *G.* 2, c. 13, similar phraseology is used; in the first section of it, after reciting the statutes of *G.* 1 and *W.*, it speaks of the "bishop or other ecclesiastical person chargeable" under them, not the living or benefice chargeable; and the same form of expression is used in the subsequent section of the Act. There is nothing in either of these Acts to create a charge on the benefice. Statute 40 *G.* 3, c. 82, was referred to, but the section relied on (section 2) relates only to the see of Meath; and it does not appear to mean more than that the expenditure for the mansion-house of that bishoprick shall be deemed a charge under the previous Act, without stating in what sense it is to be a charge on the see, or declaring it to be so otherwise than it would have been if there had been no doubt about the case being within the previous statutes.

In the same way, the Church Temporalities Acts refer to these payments for building as charges on the successors to the benefice only. Thus, statute 3 & 4 W. 4, c. 37, s. 112, deals with divided parishes where "the incumbent of any such divided parish shall be entitled to receive any sum of money from his next successor" on account of buildings. Statute 4 & 5 W. 4, c. 90, s. 11, is similar; it provides for cases where disappropriations are made and the person on whose death or removal they take place is "entitled to receive from the next successor" money on account of buildings, and enacts that it shall be lawful for the Lord Lieutenant, &c., "to order and direct that such sum or sums of money shall be charged or chargeable in such shares and proportions, &c., upon the several parishes, &c., and such shares and proportions shall be paid and payable by the several incumbents of such parishes respectively, or by the person or persons thereafter to be entitled to such tithes or portions of such tithes or glebes or part or parts thereof respectively" in the same manner as the whole sums would be payable; and the proviso is in the same form; thus treating the charge again in the same words as the former statute—that is, as a charge on the incumbent, to be recovered from him by the mode prescribed, not as a charge on the living, recoverable by means of a bill in equity.

Thus there is nothing in the subsequent Acts to add jurisdiction beyond what was given by the first statute. This bill therefore is a perfect novelty, and appears to me unsustainable. The demand to which it relates is a simple legal demand. The same section of the statute which creates the demand gives the appropriate remedy. There is no legal difficulty or impediment which the plaintiff comes to this Court to remove; if there was, perhaps, the Court would have jurisdiction. But there is no such ground of equitable relief suggested. The fact of there being sequestration creditors affords no such ground. They and the Bishop and the incumbent are the parties here. The plaintiff's rights as between him and the sequestration creditors or incumbent are at common law; as regards the Bishop the rights are partly of common law and partly of ecclesiastical jurisdiction; there is nothing to give a right in equity; there is no ground for coming here to seek a receiver

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over the benefice, especially where it is sought over the entire living. It would be dangerous to allow such a claim; much more so to deprive the incumbent of the whole living than to leave his predecessor to the chance of losing his debt. The statutes have been framed with anxious care that the successor shall not be more incumbered than is necessary. The Act of *William* was very stringent; the subsequent Acts have modified it; one of them (a) provides that he shall not be liable to repay more than one year and a half's income of the benefice; others regulate the proportions in which the successive incumbents are to contribute. One very important provision in 9 *G.* 2, c. 13 (b), protects the successor from liability to repayment for the first year: that is, until he has discharged the ordinary expenses of his appointment. So that even if I took a different view of this case, I would hold that for that one year the defendant was not liable to be charged. That would be for the dignity and honour of the church; for it would be very unfair that a clergyman should be harassed immediately on his appointment with such a claim. It may be a great hardship on the person who advances the money, to have the living filled by a successor already deeply embarrassed; that, however, cannot found a new jurisdiction; it is to be provided against by the exercise of due caution by the person appointing the succeeding incumbent, in seeing that he does not intrust the living to a person so unfortunately circumstanced. In saying this, I desire to be understood as not implying any reflection on the exercise of ecclesiastical patronage in the appointment of Mr. Horner.

This in effect will ultimately decide the cause, and I may regard this as a final hearing, for nothing new can be brought before the Court. I think it is plain that the suit cannot be sustained. I cannot assume a new jurisdiction, after a lapse of one hundred and sixty years, for I have not heard that a bill for such a purpose was ever before sustained.

It will be of course, in consequence of this decision, to discharge the order of the Master of the Rolls and remove the injunction;

(a) 12 *G.* 1, c. 10, s. 3.

(b) See sect. 33.

but I think it will be better now to dispose of this money than to leave the parties to embark in further litigation. On the views I have stated, the judgment creditor is entitled to this money as far as it is not bound to answer ecclesiastical purposes, the liability to which accrued before or during the period when the rents accrued, viz., the two years. Even if I had a different opinion on the question of jurisdiction I would regard the position of the parties in accordance with the decision of the Court of Law. The Court of Common Pleas has adjudicated upon the claim of Mr. Brooke; I accede to their decision, for I have no authority to differ from them. Any other charge must be attended to by which the Primate seeks to have a portion of this money for ecclesiastical purposes. On reading the certificate, it appeared to me that there was some such demand, there being a commission of dilapidations, and that the Primate had a claim to the amount due upon that account. According to the case of *Baker v. Swayne* (a), in the Exchequer, a moiety of the sum received out of the living is liable for that. But in that case the facts were different; for the sequestration issued in August 1835; the defendant died in July 1836; the sequestrator had only a year's income; he received that in the life-time of the incumbent, and it was attached, and considered to be distributable, not as general assets, but as appropriated to the purposes of the sequestration. The Bishop of Meath had issued a commission of dilapidations after the death of the incumbent. That must have been done at the instance of the new incumbent, under the Act 10 W. 3, c. 6, s. 6, which enables successors to institute ecclesiastical proceedings to recover the sums requisite to put glebes, &c., in repair. That being done at the instance of the succeeding incumbent, and the Bishop having in his hands this money of the former incumbent, the Court of Exchequer considered that the Bishop was entitled, without any further proceeding, to apply that money in making good those dilapidations. It might be difficult to follow that case in the present. The executors there were not before the Court; but the sequestrator having received the money, the Court did not

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(a) Jo. & Car. 231.

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deal with it as general assets, for it was quite clear that it was subject to the demand under the sequestration. No question as to the right of the incumbent's representatives was raised; the claims were of the same nature, and all the money was considered applicable to similar purposes. Here the circumstances are different; the proceeding is by a commission in the same way as it appears to have been there, and speaks of the incumbent's successor, but the money got in is not that of a preceding incumbent, but of the present incumbent. That makes a distinction between the facts of the case; whether it makes any difference in the legal consequences is another question. The question that arises here is, whether it having been in the power of the Bishop, under statute 11 & 12 *G. 3*, c. 17, to compel Mr. Horner to repair the glebe, by another form of proceeding, and the Bishop having issued the commission and having the money now in his own hands, he is entitled to retain that money for the same purpose.

The 10th section of statute 11 & 12 *G. 3*, c. 17, is very strong, and would import that it is in the power of the Bishop immediately to institute proceedings to enforce putting the glebe-house in repair. That section however is not to be read by itself, for it incorporates the directions of statute 7 *G. 3*, c. 9, and directs the monition to issue only after a commission and the steps directed by the previous Acts to be taken to ascertain what sum would be reasonable to be expended in repairs. The steps to be so taken are pointed out by the 4th and 5th sections of statute 7 *G. 3*, c. 9.* These Acts, in words, apply to *all* cases of dilapidations. At the end of a year, from his appointment, by the statute of *G. 2*, Mr. Horner became liable to pay whatever was due to his predecessor for the glebe improvements, and he is entitled under these statutes of *G. 3* to have a commission issued to ascertain the sum proper to be expended in making good dilapidations in the time of his predecessor. He might set off one against the other. That is provided for by statute 12 *G. 1*, c. 10, s. 9. The fair meaning of that section is, that when the sums payable for improvements and to be expended on the dilapidations are

* This Act is called an Act of 8 *G. 3* in statute 11 & 12 *G. 3*, c. 17, s. 10.

both ascertained, the successor is then to lay out the latter sum, which he is to be allowed to deduct. Taking all the Acts together, as they apply to this case, their just construction is, that when the predecessor claims a charge against his successor for improvements which cannot be enforced for a year, and there is a charge for dilapidations to be set off against that, the obligation to make the repairs should be connected with the liability against which it is to be set off. If there are no dilapidations, the whole amount ascertained as payable for improvements is due to the predecessor; but if there are dilapidations, a part is due to the incumbent himself to make the repairs, and part to the predecessor. If during the first year he was forced to expend that in repairing the dilapidations, he might never be able to recover any part of it. That would be a harsh and unnatural construction, which I would not adopt unless compelled to do so.

I think therefore that in the present case, as far as regards the first year's income, no part of it can be attached for repairs as against Horner. His creditors stand exactly in his place, and take no more and no less than he would; and as, if the question were between him and the church, no part of the first year's income would be liable to go for dilapidations, so no part of it is to be taken as against his creditors. After the first year, the income would be subject to the payments for dilapidations in the first instance in Mr. Horner's hands, and his creditor cannot have more than he. Perhaps I am going too far in dealing with these questions, and they are more proper for the Court of Common Pleas; but as I have the money in Court, and the sum is small, I think it better to dispose of the entire case. Though I think there is no ground for giving priority to this claim to the entire amount of it, yet I think that where the Bishop has sequestrated the living, these claims of an ecclesiastical character must be regarded as to future receipts. As to the money brought in, there have been no proceedings yet taken by the Primate. If the case in the Exchequer is well decided, a moiety of the next year's income, after the first year, the Primate is entitled to, or to so much of it as will be properly appropriated to make good dilapidations. Thus the Primate cannot be entitled to more than the moiety

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of that second year's income; *i. e.*, a moiety of the November gale of rent and rent-charge in this case. I cannot now apportion the money; but I would be disposed to hold that the Primate is entitled to keep a moiety of that sum. If the parties can adjust the account on that principle, I will, in reversing the order of the Rolls, make an order for paying out the money.

Feb. 25.
June 22.

His Lordship made an order that the Accountant-General should transfer to R. H. Mills and F. N. Mills the sum of £320. 19s. 4d. Government stock, and that the motion should stand over until next Term. It was mentioned again in Trinity Term, and a further order was made on the 22nd of June, by consent of the parties, that the sequestrator should pay out of the funds in his hands £132. 7s. to the Mills's for their demand, and a sum for the costs incurred by the Primate; that the sequestrator should pass a final account; that the plaintiff should pay the Mills's whatever further sum should appear to be due to them for their costs in the cause and at law, and should have them over; and that the bill should be thereupon dismissed against R. H. Mills and F. N. Mills.

NOTE.—As to the authority of *Baker v. Swayne*, and the Bishop's claim for dilapidations, referred to in the Chancellor's judgment in this case, see *Casey v. Horner*, 10 Ir. Law Rep. 221.

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May 4, 12, 14.

JOHN GALBRAITH the elder being seised of the lands of Roscarvey in the county of Tyrone, died in 1800, having by his will devised them (subject to a jointure of £50 a-year for his wife Catherine, created by a settlement) to his eldest son James Galbraith, in tail male; with remainder to his second son John Galbraith, in tail male.

On the death of his father in 1800, James Galbraith entered into possession, and continued so until his death in 1835.

In 1826 John Galbraith intermarried with Miss Jane Galbraith; and by the settlement made on that occasion all his landed property, including a lease of forty acres of Roscarvey for nine hundred and ninety-nine years at a rent of £10 a-year, and all the property of the lady were settled on him for life; with remainder to her for life; with remainder to the children of the marriage, of whom there were several now living.

On the death of James Galbraith, unmarried and without issue, in 1835, John Galbraith became entitled as tenant in tail in possession of the lands of Roscarvey.

By indenture bearing date the 7th day of May 1836, and made between John Galbraith of the first part, Samuel Galbraith of the second part, the Earl of Belmore of the third part, Samuel Colhoun of the fourth part, Armar Lord Viscount Corry and Charles Eccles of the fifth part; after reciting, amongst other things, that Samuel Galbraith and William M'Conkey, executors of Catherine Galbraith, were entitled to two sums of £461. 10s. 9d. and £92. 6s. 1d., arrears of her jointure, bequeathed by her for the use of John A. Galbraith and Arthur L. Galbraith, two of the sons of John Galbraith, and that Samuel Galbraith had agreed to join John Galbraith in the deed, upon the latter executing two bonds to secure these sums; and also reciting that Samuel Colhoun had then lent John Galbraith

Statute 10 Car. 1, c. 6, s. 10 (13 Eliz. c. 5, Eng.) in favor of creditors, avoids only deeds which would deprive them of such property as they could make available without their debtor's aid. Therefore, a settlement by a tenant in tail in 1836, by which he opened and re-settled his estate on himself for life, with remainder over, is not within it.

The solvency or insolvency of the debtor affords no certain test whether a deed is void under that Act; but each case must be judged by all its circumstances.

Section 87 of statute 6 W. 4, c. 14 (sect. 73 of the English Bankrupt Act, 6 G. 4, c. 16), is retrospective as to conveyances made before the Act. *Seem*, it is not so as to Commissions before the Act.

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£1600, which was secured by his bond; and that it was John Galbraith's intention to charge that sum and also, subject thereto, the two previously mentioned sums, upon the lands of Roscarvey; these lands were conveyed to Lord Corry and Charles Eccles and their heirs, to the intent that the estate tail should be barred, and that they should hold the lands subject to and in trust for the payment of those three sums; and also subject to an annuity therein granted for Jane Galbraith, the wife of the settlor, in case she should survive him; and the trustees were empowered to raise by sale or mortgage the three sums before mentioned; and subject to these trusts the lands were conveyed to the use of the settlor John Galbraith, for life, remainder to his first and other sons successively in tail male, with remainder to his own right heirs for ever; reserving however to John Galbraith full power and authority to charge the said lands and premises with any sum he might think proper for daughters or younger sons, by any deed, will or writing whatsoever, under the hand and seal of him the said John Galbraith.

Previous to and at the time of the execution of this deed, John Galbraith was indebted in several sums on foot of judgments, bonds and simple contract debts.

He was also seised of the lands of Greenmount and other properties, and had procured possession of the lands of Beagh, in order to throw them into the demesne of Greenmount, and repaired and used in the making of oatmeal a mill which was on these lands.

After the execution of the settlement John Galbraith contracted further debts, and becoming much embarrassed and executions having been issued against him, he left Ireland in the month of August 1841, and went to reside in Belgium.

On the 26th of November 1841 a commission of bankruptcy was issued against him, under which he was declared a bankrupt, and Robert Clements, one of his creditors, was appointed his assignee.

John Galbraith never returned to Ireland, but died in London on the 31st of January 1842, while on his way to this country to surrender himself. Debts to the amount of over £7000 were proved under the commission, and the property of the bankrupt,

except Roscarvey, was sold, and the proceeds were applied towards the payment of his debts. Robert Clements died in April 1843, when his son, the plaintiff, was appointed assignee in his stead, and also subsequently became entitled to the sums due to his father, both beneficially and as his executor.

The bill in this cause was filed on the 15th of December 1845 by the assignee, at the instance of the creditors, against Charles Eccles the surviving trustee in the deed of May 1836, and against Samuel Galbraith and Jane Galbraith and John Arthur Galbraith, the heir-at-law of John Galbraith and the first tenant in tail under that settlement. The bill sought to set aside that deed, on the ground that John Galbraith was a trader within the meaning of the Bankrupt Acts, and was in insolvent circumstances at the time when it was made; and also on the ground that it was a voluntary conveyance, and fraudulent and void against the creditors, and intended to defraud and delay them within the meaning of the statute 10 *Car.* 1, sess. 2. c. 6.

The evidence, both in relation to the trading and insolvency was conflicting and unsatisfactory. The only proof of the trading was in connection with the mill; some of the witnesses swore that it was worked by Galbraith for his own profit, and that he bought grain for the purpose of grinding, and sold oatmeal to the public: while other witnesses swore that the mill was worked for the benefit of the tenantry of Roscarvey, who were entitled to have their corn ground at the mill on those lands which was now disused, and that Mr. Galbraith never traded as a miller nor made profit by grinding, although his miller bought and sold occasionally for his own profit. There was also evidence of his buying and selling cattle; but it did not appear that he did so otherwise than as any country gentleman might have done.

It was also proved that, though Mr. Galbraith had contracted debts to a very large amount, yet a great number of them were discharged before the execution of the deed, and that, though temporarily embarrassed and in dread of executions, he was possessed of a considerable income.

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It appeared that in 1843 Robert Clements, as assignee, instituted an action in the Court of Queen's Bench against one Hugh Gore Edwards, to recover a policy of assurance pledged by John Galbraith to him; that at the trial the jury found a verdict for the plaintiff, finding that Galbraith was a trader within the meaning of the Bankrupt Laws; and that a motion for a new trial was refused with costs; but the principal defendants alleged in their answer that some members of the Court were not satisfied with the verdict of the jury on the question of the trading.

Argument. The *Attorney-General*, Mr. J. D. Fitzgerald, Mr. S. B. Miller, and Mr. Norman, for the plaintiff.

First, the deed of 1836 is void under the 10 *Car.* 1, sess. 2, c. 6, s. 10, as having been made with the intent to delay and defraud creditors. The nature of the deed itself and the existing circumstances of the settlor's family at the time show this. His wife was entitled to a life use of all his property under her marriage settlement, and the children were ultimately entitled, so there could be no occasion to secure a jointure for her, nor did the deed profess to do so; and the power reserved by Galbraith to charge to any amount for the younger children showed a design to place the property beyond the reach of creditors, giving him substantially the entire control and disposition of it. Neither can it be supposed that, having acquired an estate tail the year before, he would cut down his interest to an estate for life, for the benefit of a child then only a few years old. Then the settlor was indebted at the time to a large extent, and far beyond the worth of his other properties. It is true that it is laid down by Lord Alvanley in *Lush v. Wilkinson* (a), that to avoid a deed under the statute the settlor must be indebted to the extent of insolvency, but that doctrine is qualified by subsequent cases: *Shears v. Rogers* (b); the principle of which is reasonable, for the deed itself makes the debtor insolvent, which is the reason it should not stand; and a creditor subsequent to the

(a) 5 Ves. 384.

(b) 3 B. & Adol. 362.

deed may impeach it: *Richardson v. Smallwoodie* (a); *Townsend v. Westacott* (b); *Walker v. Burrowes* (c); *Lord Townsend v. Wyndham* (d); *Taylor v. Jones* (e); *O'Connor v. Bernard* (f). The fact that Galbraith, by taking an estate for life instead of his previous estate tail, left the creditors in the same position as if he had done no act at all, is not material; for the deed necessarily had a double operation; first opening the estate and converting it into a fee and then re-settling it; it is therefore immaterial how the fee was acquired, and a party will not be allowed to acquire an absolute estate for his own purposes only, but with the benefits must take all the consequences of having the absolute control of it.

Secondly, this deed is also void under the Bankrupt Act 11 & 12 G. 3, c. 8, ss. 3 & 7, which was in force at the time of the execution of the deed.* The bankrupt must therefore be considered to have been tenant in tail at the time of the issuing the commission; and then by the 49th and 58th sections of 4 & 5 W. 4, c. 92, the Commissioner is empowered to dispose of that estate tail for the benefit of the creditors. But if not within these Acts, the deed is plainly invalidated by the 87th section of the late Bankrupt Act, 6 W. 4, c. 14, within the very words of which it falls.

Serjeant *Warren*, Mr. *Christian* and Mr. *Henderson*, for the principal defendant.

As to the first point. To avoid a deed under the Statute of Fraudulent Conveyances, the grantor must have been indebted to the extent of insolvency at the time of its execution: *Lush v. Wilkinson* (g); *Martyn v. M'Namara* (h). The cases relied on of *Shears v. Rogers* (i), *Townsend v. Westacott* (k), do not alter the

(a) Jac. 552.

(c) 1 Atk. 96.

(e) 2 Atk. 600.

(g) 5 Ves. 384.

(i) 3 B. & Ad. 362.

(b) 2 Beav. 340.

(d) 2 Ves. sen. 1.

(f) 2 Jo. 654.

(h) 4 Dru. & War. 427.

(k) 2 Beav. 340.

* The 6 W. 4, c. 14, which repealed the 11 & 12 G. 3, c. 8, though it received the royal assent on the 20th of March 1836, did not come into operation until the 1st of July 1836.

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rule. The Court must be satisfied the deed was executed with a fraudulent intention: *Manders v. Manders* (a); *O'Connor v. Bernard* (b). The property must also have been such as was tangible and could be made available by the grantor's creditors, and therefore the statute or the authorities cannot apply to the case of an estate tail, which, without the grantor's act, the creditors could not have touched any more than a chose in action: *Norcott v. Dodd* (c); *Mathews v. Feaver* (d). This is a *bona fide* settlement by a person not indebted at the time to the extent of insolvency; and even though it were voluntary, would be supported: 2 *Sug. Powers*, p. 234; *White v. Sansom* (e). The disentailing deed did not give a fee to J. Galbraith so as to let in these creditors on the inheritance, nor would a recovery under the old law have done so: *Burke v. O'Malley* (f). Under this deed the creditors were left all they could ever have made available if Galbraith had not executed it, viz., an estate for his life.

As to the second point—namely, the effect of the bankruptcy in 1841, on the deed of the 7th of May 1836,—it is contended that it depends on the 7th section of 11 & 12 G. 3, c. 8, and 4 & 5 W. 4, c. 92, ss. 49 and 58. If a commission had issued immediately after the execution of the deed, a difficult question might have arisen as to the operation of those Acts; but before Galbraith became bankrupt the recent statute 6 W. 4, c. 14, was passed, which repealed 11 & 21 G. 3, c. 8, and ss. 76, 79 and 87* of which are *prospective*

(a) 4 Ir. Eq. Rep. 484.

(b) 2 Jo. 654.

(c) 1 Cr. & Ph. 100.

(d) 1 Cox, 278.

(e) 3 Atk. 411, 412.

(f) Beat. 96.

* Sec. 76.—“And be it enacted, That all lands, tenements and hereditaments (except copyhold or customaryhold) in England, Scotland, Ireland, or in any of the dominions, plantations or colonies belonging to his Majesty, to which any bankrupt is entitled, and all interest to which such bankrupt is entitled in any of such lands, tenements, or hereditaments, and of which he might, according to the laws of the several countries, dominions, plantations, or colonies, have disposed, and all such lands, tenements and hereditaments as he shall purchase, or shall descend, be devised, revert, or come to such bankrupt, before he shall have obtained his certificate, and all deeds, papers and writings respecting the same, shall vest in the assignee or assignees for the time being of such bankrupt, whether appointed by the Commissioner or chosen by the creditors of the bankrupt, as heretofore mentioned, for the benefit of the creditors of the bankrupt, by virtue of such appointment or choice

only: *Key v. Goodwin* (a); *Maggs v. Hunt* (b); *Terrington v. Hargreaves* (c). Besides, under the latter section it would be discretionary to set aside the voluntary conveyance, though under the former sections it would be imperative to sell an estate tail if the bankrupt had such estate at the time of the commission. The effect of the repeal of the former Act was to expunge it as if it had never been enacted. The 87th section is analogous to the 73rd of the English Act, which has been decided not to be retrospective: *Wombwell v. Laver* (d); and even if it were retrospective, it only applies to the case of a person absolutely insolvent at the time of executing the deed.

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Mr. Sheil and Mr. Francis Fitzgerald, for defendants in the same interest.

Mr. J. D. Fitzgerald, in reply.

The deed is within the statute of *Charles*, both the *intent* and

(a) 6 Bing. 576; S. C. 4 M. & P. 341.

(b) 4 Bing. 212.

(c) 5 Bing. 489; S. C. 3 M. & P. 137.

(d) 2 Sim. 360.

as aforesaid, and without any deed of conveyance for that purpose, discharged from any claim of the bankrupt, or any person deriving under him."

Sec. 79.—"And be it enacted, That the Commissioner shall, by deed indented, and enrolled in any of his Majesty's Courts of Record at Dublin, make sale, for the benefit of the creditors, of any lands, tenements and hereditaments, situate either in England or Ireland, or elsewhere; whereof the bankrupt is seised of any estate tail in possession, reversion, or remainder, and whereof no reversion or remainder is in the Crown, the gift or provision of the Crown; and every such deed shall be good against the said bankrupt and the issue of his body, and against all persons claiming under him after he became bankrupt, and against all persons whom the said bankrupt, by virtue of the provisions of any Act now in force for the abolition of fines and recoveries and substituting other assurances in lieu thereof, or any other means, might cut off or debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements and hereditaments."

Sec. 87.—"And be it enacted, That if any bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration) have conveyed, assigned, or transferred to any of his children or any other person any hereditaments, offices, fees, annuities, leases, goods or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person or persons, or into any other person's name, the Commissioner shall have power to sell and dispose of the same as aforesaid; and every such sale shall be valid against the bankrupt and such children and persons as aforesaid, and against all persons claiming under him."

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effect of it being to delay creditors. As against *pre-existing* creditors the law formerly was, and still is in America, *Reade v. Livingston* (a), that such a deed is void without any inquiry as to the amount of debts; but as against *subsequent* creditors, though it would be necessary to make out insolvency, according to *Lush v. Wilkinson*, yet even that case does not go to the extent contended for by the defendant; and according to other authorities the proof of a substantial amount of debts is enough: *Townsend v. Westcott* (b); *Taylor v. Jones* (c); *Walker v. Burrowes* (d). It is sufficient if the grantor was so indebted that the withdrawal of the property in question would render him insolvent. The estate being an estate tail is immaterial; for beside the circumstance that the settlor acquired the fee, and the case being the same as if that was by a separate deed, he at least converted an estate tail, which he *might* make, and was morally bound to make, available for his creditors, into an estate for life, and also conveyed the reversion in fee which he had before. It is enough if the deed has a tendency to delay creditors: *Partridge v. Gopp* (e). Under the Bankrupt Act also the deed is void, if the bankruptcy is proved. The statute of G. 3 was in force when the deed was made, and if it was void then it cannot have since become valid. Besides, the 87th section of 6 W. 4, c. 13, is retrospective; the words are, "shall have conveyed." The party need not be absolutely insolvent to come within this section; it is enough under it to show that the deed itself would make him so; otherwise the section is useless. The cases cited on the other side, which are not on this section, do not apply.

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THE LORD CHANCELLOR.

If the plaintiff had made out a sufficient case in point of law either for granting an inquiry or for a decree, on the construction of the deed, I would say that Mr. Galbraith was very largely

(a) 3 John's Rep. 481, cited 1 Story Eq. 389.

(b) 2 Beav. 340.

(c) 2 Atk. 600.

(d) 1 Atk. 93.

(e) 1 Ambl. 598.

indebted at the time, and that he was making a provision for his family which a man ought not to do to the prejudice of his creditors. On this branch of the argument a great many cases were cited, but they all come round to the same question, namely, was the deed made with the intent to delay or defraud his creditors, within the meaning of the statute of 10 *Car.* 1, sess. 2, c. 6, s. 10? It is impossible to lay down any precise rule on the subject, I mean as derived from the condition and circumstances of the party making the deed. Each case rests on its own circumstances, taken all together. If there was a case of actual insolvency it may be clear; but, at the same time, a man abounding in wealth and quite solvent may be within the Act of *Charles*, as to creditors. There may be instances within the meaning of that Act of the conveyances of persons having abundant means coming within its provisions. For example, if a man had property vested in the funds before the recent statute (a), and at the time a very small amount of other property which could alone be attached by his creditors, though he would be perfectly solvent, yet, if for the purpose of defeating his creditors he made away with the available property by deed, the deed might be held to be within the operation of the statute. Again, a person being indebted to a considerable amount might execute a deed which would be a perfectly honest deed; and if it was so at the time it would not become fraudulent by matter *ex post facto*. For example, a man indebted may have two estates and each of them sufficiently ample to pay his debts, and the debts being provided for upon one of these estates he fairly settles the other on his family, leaving the former property an ample security for his creditors; but shortly after it happens that this last is evicted by title paramount; it would be hard to say that this event would render the settlement fraudulent. It therefore appears to me that the solvency of the party affords no infallible rule; but that every case must be judged by its own particular circumstances. On the one hand, it is too much to say that the insolvency of the party would *per se* be enough to make the deed fraudulent; while on the

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(a) 3 & 4 Vic. c. 105.

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other hand, his solvency will not necessarily exclude the possibility of the deed being fraudulent. If however it appeared that the case can properly be considered as within the provision of the statute of *Charles* as to creditors, I would grant an inquiry on the point of insolvency.

But the question on this part of the case is of much difficulty, having regard to the nature of the property which Galbraith had at the date of the deed. It is singular that this is the first time that a question on a property so circumstanced appears to have arisen on the statute of the 13 *Eliz.* c. 5. I refer to the English statutes for convenience sake in speaking of the authorities, as one Irish Act contains the provisions of the two English Acts.

The analogy applicable to this case is, I think, founded on the cases referred to in the argument, where it was held that property not available to creditors upon executions is not within the statute. Thus it was held in the case of *Sims v. Thomas* (a) that a bond being property of this description was not within the statute. Copyhold property also has been held not to be hereditaments within the meaning of the statute of 13 *Eliz.*, though the contrary was held in reference to the statute of the 27 *Eliz.* So that the same property has been held to be within the latter, though not within the former statute, by reason of its not being available for debts. In the case of *Mathews v. Feaver* (b), where an inquiry was directed, an assignment of copyholds was held not within the 13 *Eliz.* Applying these authorities to the present case, it is difficult to say that they do not afford a strong analogy. The property here, being entailed, was in the dominion of Galbraith as tenant in tail, either to leave it as he got it or to convert it so as to become absolutely his own; but leaving it as it was, the creditors could have nothing except during his life. What he did was this; he had occasion to borrow a sum of money to pay some of his debts and to secure particular creditors, and being about to disentail his property for these purposes, he incorporated in the deed these provisions said to be fraudulent. It might, no doubt, have been a different case, had he disentailed the property by one

(a) 4 Per. & Dav. 233; S. C. 12 Ad. & El. 536. (b) 1 Cox, 278.

deed and afterwards settled it by another; yet even then it would be difficult to say he could not have removed it from his creditors, the whole being one transaction; my impression is, that in such a case the settlement would be good. I entertain a very strong impression that this arrangement which he has made is not fraudulent. A contrary decision would be very inconvenient; for if a tenant in tail could not disentail the property without the deed being held to be within this section as to fraudulent deeds, no one owing any debts could safely re-settle his estate; and the Courts have encouraged the opening and re-settling estates. The creditors here have not been delayed or defrauded of any thing. The settlor has not shown any fraudulent intent, inasmuch as he has given to the creditors the same remedies, as far as he was concerned, which they had before, namely, the power of going against his life estate. Upon these grounds, my opinion is that the authorities do not lead to the conclusion that the deed can be considered as a fraudulent one against the creditors. There is one case which has not been alluded to, the case of *Brown v. Carter* (a); but the conflict there was not between the settlement and creditors generally, but between trustees under a deed of trust and the trustees of a prior settlement; and the relief was refused there because the only equity to break the settlement was that it was one between a father and son, executed by the latter upon coercion; but the Court would not disturb it, on account of the son intervening between the settlement and the deed of trust, the marriage and lapse of time. The point in the present case as to the operation of the statute 13 *Eliz.* c. 5 on such a case is, however, glanced at by Counsel, who, in the argument there, observes (b):—"It cannot be brought within the statute 13 *Eliz.*, as probably the son at that time had not many creditors. The opinion thrown out by Lord Mansfield in *Doe v. Routledge* (c) was not adopted in other cases. There is no doubt that a voluntary settlement is void against purchasers for valuable consideration, and though creditors cannot at this time shake this settlement

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(a) 5 Ves. 862.

(b) *Ibid*, p. 867.

(c) *Cowp.* 705.

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made in 1769, these trustees for creditors are in a different situation, standing here as purchasers for valuable consideration." My present impression is, that the case is outside the statute.

The next question is one of greater difficulty; that is, is this deed within the operation of the late Bankruptcy Act? for it is admitted that the 11 & 12 *G.* 3, c. 8, and the Fines and Recovery Act do not touch the case; but it is said to be within the Act of 6 *W.* 4, c. 14, and the question is, whether the 87th section is retrospective as to conveyances made before it was passed? The only direct authority cited is that of *Wombwell v. Laver* (a). Both the Counsel in arguing that case and the Vice-Chancellor in his judgment seem to consider that the similar section in the English statute is not retrospective. Certainly the words "shall have" in that section would *prima facie* import that it had a retrospective operation and seem to include all transactions of such a nature. This point of the case is deserving of further consideration; but it will be necessary to show that Galbraith was, at the time of the execution of the deed, actually insolvent, and this has not been proved as a matter of fact. If I come to the conclusion that the statute has a retrospective operation, I should then have to consider if Galbraith was insolvent, but as I said before, I do not think the evidence shows this. It would be a hard thing to say that a man having £1000 a-year, up to which he lives, and owing £700 or £800, is insolvent; the most that such a state could amount to would be, that he would not be able to pay his debts at a moment's notice. Insolvency must have some definite meaning, involving imminent danger of total inability to pay debts. This is a question for inquiry. It would also involve the question of trading. I should therefore have to direct two issues, or an inquiry as to one point and an issue as to the other.

I shall mention the case to-morrow.

The LORD CHANCELLOR.

May 14.

I cannot get over the difficulty arising from Galbraith's title.

(a) 2 Sim. 360.

He was tenant in tail when he executed the deed in question. I think the case is therefore within those authorities which were cited respecting property not tangible by creditors, and which decide that such property is not within the statute of the 13 *Eliz.* The case in *Atkins* (a) seems against this view; but that rested on this ground, that there was there a letter of licence which created a special claim on the estate. The case is one of difficulty, no doubt; but on the whole I think that the deed cannot be impeached under that statute.

As regards the point on the Bankrupt Act, I cannot say the 87th section is not retrospective. In *Wombwell v. Laver* (b), the question arose whether the property included in the settlement passed to the assignees under a deed from the Commissioners made prior to the passing of the last Bankrupt Act; and the Court held that the 73rd section of the 6 *G. 4*, c. 16, was not retrospective in that sense, *i. e.*, that it did not extend to a prior commission, so as to defeat the title of assignees under it, to property which had been assigned before the bankruptcy by a deed which, as the law then stood under the statute of *James*, was void against them. The other authorities bearing on the same point are collected in the note to 1 *Mont. & Ayrton*, p. 674; but they refer to the applicability of the statute to prior commissions, that is, whether it affected the rights acquired by assignees under such commissions. In *Wombwell v. Laver*, the question was on the statute of *James*. None of the Bankrupt Acts in force when the right of the assignees accrued in that case required that in order to invalidate a conveyance it should be made while the bankrupt was insolvent. That was not required by the statute of *James* in England or of *George* in Ireland. The Court held that the rights vested in the assignees by the assignment under the prior Act were not divested so as to prevent the parties from taking what they would take under the former Act. In *Cuming v. Welsford* (c), the question arose on the section providing that no creditor suing execution "upon any judgment obtained by default, confession or *nil dicit* shall avail himself of

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(a) *Taylor v. Jones*, 2 *Atk.* 600.

(b) 2 *Sim.* 360.

(c) 6 *Bing.* 502; *S. C.* 4 *Mo. & P.* 238.

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such execution to the prejudice of other fair creditors;" and the Court held that as regarded creditors by judgments on confession entered up before the passing of the Act, executions afterwards issued by them were within it.

I see nothing in the Act to show that a commission issued a day or a week after the Act passed would as to this point be in a different position from a commission issued some years after; and that all the property conveyed away by such a deed as is contemplated by the 87th section, executed a week before the passing of the Act, would be abstracted from such a commission. The words of section 87 are, "*shall have conveyed*," not *shall* convey. These words may well be construed to be retrospective as between the Act and the conveyance, though they may not be so as between the Act and a prior commission. I think therefore this case is within it. If the defendants think they can sustain a different view, they may have a case to a Court of Law.

Two questions then will remain for inquiry, viz., whether this gentleman was insolvent? and whether he was a trader? These questions may be tried at the next Assizes for Londonderry, and so much of the case as depends on them must stand till they are decided. The remainder of the suit must be dismissed, with costs.

A case to a Court of Law was declined, and issues were directed; "first, whether John Galbraith, at the time of the execution of the deed of the 7th of May 1836, was insolvent; secondly, whether the said John Galbraith was, at the time of the execution of the said deed, a trader within the meaning of the Bankrupt Laws;" and the bill so far as it related to the statute of 10 Car. 1, and sought relief thereunder, was dismissed with costs.

Reg. Lib. 97, fol. 47, 1847.

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(In the Rolls.)

March 4.

THE bill stated that Harvey Cassidy being seized of certain lands in the county of Kildare, of a brewery, a distillery, and a house in Monasterevan, and being entitled to other property, real and personal, made his will on the 2nd of March 1839, by which he devised the aforesaid property to the use of his brother (the defendant Robert Cassidy), with remainders over after his decease; and after further directing and declaring that in case at the death of his mother, all or any of his three sisters, the plaintiff Mary Anne Cassidy, Harriet Cassidy and Emily Cassidy, should be then alive and unmarried, then and in such case, from and immediately after the death of his said mother, his said three sisters, the plaintiff Mary Anne and the said Harriet and Emily, or such of them as should be then living and unmarried, should be permitted to use, hold, occupy and enjoy the dwelling-house in the town of Monasterevan during such period of their respective natural lives as they should continue sole and unmarried, and until their respective deaths or marriage, as the case might be, whichever should first respectively happen; and subject thereto, the testator gave and bequeathed the said dwelling-house, &c., unto the defendant Robert Cassidy and his heirs for ever: and after making several other bequests, he bequeathed to the plaintiff George Evans and to James O'Ferrall, their executors, &c., during such period of the natural lives and life of his three sisters, the plaintiffs Mary Anne Cassidy, Harriet Cassidy and Emily Cassidy, and the survivors and survivor of them, as they or any of them should continue unmarried, an annuity of £800, charged upon all such parts of his real and personal property as were thereinbefore bequeathed, devised or disposed of, unto or to the use of his said brother Robert Cassidy; the annuity to be payable to the plaintiffs George and

The doctrine of civil death by profession ceased to be law at the Reformation, and was not revived by the Roman Catholic Emancipation Act (10 G. 4, c. 7). Therefore the Court granted a receiver, on a bill filed to raise the arrears of an annuity devised in trust for a lady who afterwards became a nun, during such period of her natural life as she should continue unmarried.

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James, their executors, &c., during so many years of the natural lives and life of his said three sisters and of the survivors and survivor of them, as they his said sisters or any of them should continue unmarried, by two half-yearly payments on the 1st of May and 1st of November in every year; on trust that the plaintiffs George Evans and James O'Ferrall, their executors, &c., should pay and dispose of the same in equal proportions, share and share alike, unto and amongst his said three sisters during such period of their joint natural lives as they should each and all of them remain unmarried; and when and as soon as any of his said three sisters should die or be married, as the case might be, whichever should first happen, upon trust thenceforth to pay and dispose of the entire of the said annuity in equal shares and proportions, share and share alike, unto and amongst any other two of his said three sisters during such period of the joint natural lives of the said two other sisters as they both and each of them should respectively continue unmarried; and when and as soon as either of said two other sisters should die or be married, as the case might be, whichever should first happen, then upon trust thenceforth to pay and dispose of the entire of the said annuity unto such remaining one of his said three sisters as should then be alive and unmarried, and during such period of her natural life as she should continue unmarried; it being his intention, and he thereby declared that on the death or marriage of such one of his said three sisters as should first die or be married, as the case might be, during the continuance of the said annuity of £800, then that the same annuity should thenceforth belong to and be the sole property of the other two of his said three sisters whilst they should be living unmarried; and that on the death or marriage of such one of his said other two sisters as should thereafter die or be married, as the case might be, during the continuance of the said annuity, then that the same annuity of £800 should thenceforth belong to and be the sole property of the remaining one of his three sisters as should be then alive and unmarried, and during such period of her natural life as she should continue unmarried. The testator, after certain other dispositions, devised and bequeathed all the residue of his real and personal estate, subject to the said annuity, and to his legacies and

to his debts and funeral expenses, to the said Robert Cassidy, and appointed the plaintiffs George Evans and James O'Ferrall his executors.

The bill then stated that the testator died on the 17th of March 1839, leaving his brother and three sisters surviving him; that the executors renounced, and R. Cassidy proved the will and possessed himself of the personal estate and entered into receipt of the rents of the real estate. That the mother of the testator was dead, and the defendant R. Cassidy had assented to the bequest or devise of the annuity.

The bill further stated the marriage of Harriet and Emily, two of the testator's sisters, whereby the other sister Mary Anne became the only person beneficially entitled to the annuity, which had been paid up to November 1844. The bill then stated various applications for the gales which had since accrued, and prayed that the annuity might be declared well charged, an account of the sum due on foot of it, and if necessary, of the real and personal estate of the testator, a sale and a receiver.

Robert Cassidy by his answer stated that after his mother's death and her sisters' marriage the plaintiff Mary Anne entered into the Convent of Sisters of Mercy in Baggot-street, Dublin, and became a professed nun therein, and a professed member of said convent and of said order of Sisters of Mercy. That he was informed and believed and hoped to be able to prove that said convent or community consists of a number of ladies associated together as a religious sisterhood into a religious order, and bound by certain vows under one common head or superioress, but subject to the Roman Catholic Archbishop of the Diocese of Dublin. That amongst other vows which the members of such convent are obliged to take, are vows of implicit obedience to their superior for the time being, and who is known and styled by the members of the community by the style and title of the Reverend Mother; and also vows of chastity and poverty; that such vows are made and entered into under circumstances of great religious solemnity, and at a ceremony usually performed by or in the presence of the said Archbishop and a number of his clergy, and of the entire of said community,

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and of a number of other persons admitted to be present, and are considered by the members of the said community to be of as great if not greater obligation than an oath taken in any Court of Justice. That the vow of obedience is so stringent and comprehensive, that every act and word, and the very thoughts and inclinations of the individual member are thereafter controlled by the superioress, and the party taking the same ceases to have any independent will of her own and loses all power and capacity of acting for herself. That the vow of poverty is of such a nature that it incapacitates the party from acquiring any property for her own use. That at the ceremony of profession the ceremony of marriage is also actually gone through and performed between the nun so about to be professed, and the Roman Catholic Church, represented by her clergy, and a marriage ring used upon the occasion, and placed upon the finger of the nun, who thereupon accepts the church as her spouse.

The answer then stated that the plaintiff Mary Anne became publicly professed in the month of March 1845, and on that occasion took the vows hereinbefore mentioned, and went through the ceremony of marriage, and stated and acknowledged herself to be married; that she was a professed nun and was according to law civilly dead and had ceased to have any separate civil existence; and submitted that the annuity had determined as effectually as in the case of an actual marriage or of her natural death; and that even if said annuity continued, it would belong to and be recoverable by the personal representative of the said plaintiff.

The answer also alleged that the name of the plaintiff Mary Anne was made use of in the suit by the superioress of the convent, and for the purposes of the convent, and without her free will or consent; and that since entering into the convent she had executed some deed or instrument, whereby she assigned said annuity for the benefit of the convent.

Argument.

Mr. Hughes and Mr. T. Lane, for the plaintiffs, moved for a receiver; and contended that their title being admitted, they had a *prima facie* right to a receiver on motion. The defence set up by

the answer was founded on the doctrine of civil death, which had become obsolete for centuries ; at all events the defence could not be set up on this motion, and must be reserved for the hearing of the cause : *Stitwell v. Williams* (a) ; *Richards v. Goold* (b).

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Mr. *Berwick* and Mr. *Christian*, for the defendant, contended that the doctrine of civil death was still law, although it had not been acted on since the Reformation, because the Roman Catholic religion was not recognised until the Emancipation Act 10 G. 4 ; and referred to the Lord Chancellor's observations in *M'Carthy v. M'Carthy* (c). The consequence was, that the plaintiffs had shown no title to the annuity, which was determined.

THE MASTER OF THE ROLLS.

I am of opinion that a receiver should be appointed in this case. The testator devised and bequeathed to the plaintiffs, George Evans and James O'Ferrall, their executors, administrators and assigns, during such period of the natural lives and life of his three sisters, the plaintiff Mary Anne Cassidy, and Harriet Cassidy and Emily Cassidy, and the survivors and survivor of them, as they or any of them should continue unmarried, an annuity or yearly rent-charge or annual sum of £800 sterling, to be issuing out of and charged and chargeable upon all such parts of his real and personal property as were thereinbefore bequeathed, devised or disposed of, unto or to the use of his said brother Robert Cassidy, one of the defendants ; and when and as soon as either of his said two other sisters should die or be married, as the case might be, then upon trust thenceforth to pay and dispose of the entire of the said annuity unto such remaining one of his said three sisters as should then be alive and unmarried, and during such period of her natural life as she should continue unmarried.

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Two of these ladies, Harriet and Emily, are married ; and it is said that the devise is at an end because the third, Mary Anne,

(a) 6 Mad. 49.

(b) 1 Mol. 32.

(c) Since reported, 9 Ir. Eq. Rep. 620 ; see pp. 630, 631, 632.

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although she is still living, is *civiliter mortua*. I am of opinion that there is no foundation for that argument.

The terms of the bequest, which is to Miss Mary Anne Cassidy during her *natural* life, in the events which have taken place,— would be a sufficient answer to this argument; but as the question has been raised, I think it right to state that, in my opinion, there is no foundation for the objection. It is laid down by Littleton, sec. 200, *Co. Lit.* 131, *b*, “That where a man entereth into religion and is professed, he is dead in law (*civiliter mortuus, or mortuus sæculo*), and his son or next cousin incontinent shall inherit him as well as though he were dead indeed; and when he entereth into religion he may make his testament and his executors; and they may have an action of debt due to him before his entry into religion, or any other action that executors may have, as if he were dead indeed; and if that he make no executors when he entereth into religion, then the ordinary may commit the administration of his goods to others, as if he were dead indeed.” From Lord Coke’s Commentary it appears that the same rule applied to females who were professed.

In *Viner’s Abr. Profession*, C, it is stated, “If a man enters into religion and is under obedience, yet he is not a dead person before profession.”

The question whether a party was or was not professed was tried by the ordinary and certified by him: *Viner’s Abr. Trial*, 12. Accordingly the trial at the Common Law, as to whether or not a person was professed, being by the certificate of the Bishop, it is laid down in *Rolle’s Abr. tit. Grant*, 43, E, and *Viner’s Abr. Trial*, A, that “if an Englishman went into France and there became a monk, yet he was capable of any grant in England, because such profession was not triable.”

Since the Reformation, it appears to me that by profession a party does not become dead in law.

In the passage already referred to in *Rolle’s Abr.* and in *Viner’s Abrid. Grant*, E, and *Trial*, A, after stating, “that if an Englishman goes into France and there becomes a monk, yet he is capable of any grant in England, because such profession is not triable,”—it is added, “And also because all profession is took away by the

statute, and by our religion now received, such vows and profession are held void." And *Rolle* adds, "I have heard that this was resolved accordingly by all the Justices at Serjeants'-Inn, in 44 *Eliz.*, in one *Ley's case*."

In *Viner's Abr., Trial, A*, it is stated "There is no method of trying whether a man is a monk professed or not, for the trial at the Common Law is by the certificate of the Bishop; but as the law now stands, no Bishop can certify a profession of being a monk."

In *Co. Lit.* 132, *a*, Lord Coke says, "There is a death in deede . and there is a civil death or a death in law: *mors civilis* and *mors naturalis*, as here it appeareth, and therefore to oust all scruples, leases for life are made during the natural life," &c. Mr. *Hargrave* in his note to this passage states, "But by Lord Coke observing here that *natural* is added to oust all scruples, it seems as if he did not conceive it to be absolutely necessary."

Sir *W. Blackstone*, in his *Commentaries*, vol. 1, p. 133, states, "But even in the times of popery the law of England took no cognizance of *profession* in any foreign country, because the fact could not be tried in our Courts, and therefore since the Reformation this disability is held to be abolished." He refers to *Lady Portington's case (a)*, in which case it is stated, "Supposing the devisee was a nun, it was considered how the law was then, and the Court held that a monk now might purchase, because that part of the Canon Law whereby the disability arose is now abolished, and the Common Law takes no notice of him."

There is no doubt, in my opinion, that the law was correctly decided in *Ley's case*, referred to in *Rolle's Abr.*, and that it was correctly laid down in *Lady Portington's case*, and in *Rolle's* and *Viner's Abr.* and by Sir *W. Blackstone*.

The question however at the present day may be said to be different; and that the effect of the statutes for the relief of persons professing the Roman Catholic religion has been to revive the doctrine of civil death. Previously to the Toleration Act, dissent was neither recognised nor permitted. In the case of the *King v. Larwood (b)* it is laid down that, "Time out of mind there was a

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(a) 1 Salk. 162.

(b) Ld. Ray. 30.

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discipline established in the Church of England which all persons were obliged to observe—by the Canon Law before the Reformation—and since the Reformation by the statutes of *Edw. 6* and *1 Eliz.*; so that the law took no notice of such persons as dissenters before the Act of the *1 W. & M.* (the Toleration Act). Thus previously to the Reformation every one was or was supposed to be a Roman Catholic, and from the Act of Uniformity to the Toleration Act every one was or was supposed to be a Protestant; dissent being only connived at, but not recognised by law. The Toleration Act *1 W. & M. (Eng.)* and *6 G. 1, c. 5 (Ir.)*, to a certain extent recognised dissent, but excluded Roman Catholics from the benefit of the enactment. The English Act *31 G. 3, c. 32*, and the Irish Act *33 G. 3, c. 21, s. 11*, which provided that a Roman Catholic should not be subject to a penalty for not attending Divine service in the parish church, were the Toleration Acts as to members of the Roman Catholic Church.

Subsequently to the Irish Act of Uniformity (*2 Eliz.*) and previously to the Act of 1793, it appears to be quite clear that Courts of Justice would not have recognised profession, the Roman Catholic religion not being tolerated or recognised by law. In the case of *De Garcia v. Lawson*, reported in a note to *4 Vesey*, 433, legacies had been bequeathed to the superior for the time being of an establishment of Benedictine Monks in England, to the English Black Nuns at Paris, to the Benedictine Nuns at Cambray, to the English Benedictine Monks in Lorraine, and to John Bolton, for the maintenance of a Roman Catholic minister for ever; and it was decided that these legacies were void, those to the foreign establishments being contrary to the policy of the law, the others being given to individuals in characters with respect to which they could not claim, or for an illegal establishment.

Upon the same principle it was laid down in the case in *Rolls Abr.* that “by our religion now received, such vows and profession are held void.” Other cases to the same effect might be cited.

The question therefore is, whether by the effect of the Acts for the Relief of Roman Catholics, the ancient rule, that profession caused civil death, has been revived?

By the English Act of the 31 *G.* 3, c. 32, it was declared that the relief afforded by that Act was not to be taken to warrant the foundation, endowment or establishment of "any religious order or society bound by monastic or religious vows within these realms, or the dominions thereunto belonging." That statute did not bind Ireland,—but by the 33rd and 34th sections of the 10 *G.* 4, c. 7, it is made a misdemeanour to admit a person to be a regular ecclesiastic or a member of any monastic order. It is therefore clear that profession by a monk cannot now be recognised by Courts of Justice as having the effect of causing civil death.

However, the 37th section of the 10 *G.* 4, c. 7, provides that nothing therein contained shall extend in any manner to affect any religious order of females bound together by religious or monastic vows.

I am of opinion that that section does not affect this question. The object of that Act, as appears by the preamble, was to remove restraints and disabilities from Roman Catholics to which other subjects of the Crown were not liable.

The effect of the argument on the part of the defendant would be to re-impose and not to remove a disability, and such is not in my opinion the construction of that section. It was never I believe argued, until the recent case of *McCarthy v. McCarthy*, that civil death was now to be recognised. In the Ecclesiastical Courts, probate or administration would not be granted to the executor or next-of-kin of a lady who had taken the veil. If the defendant's argument be well founded, a charge upon land or other personal property vested in a nun would not, as at the Common Law, become vested in her personal representative, but the property would be irrecoverable. So also, according to the argument of the defendant's Counsel, bequests to ladies by name who happened to be professed would be void, a devise to a person professed being void by the Common Law.

In the case of *Matilda Whyte v. Elizabeth Meade and others* (a), in which case I was Counsel, and which was decided in the Court of

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EVANS
v.
CASSIDY.
Judgment.

(a) 2 *Ir. Eq. Rep.* 420.

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Rolls.
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CASSIDY.
Judgment.

Exchequer on the 20th of June 1840, the plaintiff, who was a nun, left the convent. She had transferred her property for the benefit of the nunnery previously to taking the veil; and on a bill by the nun to recover back her property, the Court, under the circumstances of the case, decreed a reconveyance, with costs. The defendant's Counsel never thought of contending in that case that the plaintiff was dead in law and could not sue.

If a defendant in a suit in this Court, entitled in fee or *quasi* fee to real estate, was to take the veil, it would be necessary according to the argument to file a bill of revivor against her heir-at-law.

Upon the whole I am of opinion that there is no foundation whatever for the opposition to this motion. First, because no legal proof could by the Common Law be given of profession except by the certificate of the Bishop, which certificate could not now be obtained. Secondly, because it is clear from the authorities referred to that from the period of the dissolution of the monasteries, or at least from the Act of Uniformity to the time when the Acts were passed for the toleration of Roman Catholics and the removal of the disabilities to which they were subject, profession was not recognised by law, nor the consequence, which at the Common Law followed therefrom, of civil death; and the 37th section of the 10 G. 4, c. 7, which exempted females bound by religious or monastic vows from the penal provisions of the Act, did not in my opinion revive as to them the disability and incapacity to which profession subjected all persons by the Common Law.

I shall therefore refer it to the Master to appoint a receiver. No proceedings to be taken upon the order for one month.

1847.
Rolls.

MUNNS v. FERIS.

April 15, 17.

MR. SHERLOCK moved that Michael Jones, a defendant in the cause, should be at liberty to bid at the sale of the lands under the decree in this cause. He cited *Sproule v. Sproule* (a).

Whether a defendant who has not the carriage of the decree may bid at the sale in the Master's office without an order permitting him to do so? *Quære.*

The MASTER OF THE ROLLS.

I do not see why a creditor should not be allowed to bid. I shall speak to Master Henn on the subject. I think an order is necessary only where the party has the carriage of the decree.

The MASTER OF THE ROLLS.

Master Henn has been spoken to on the subject of this motion. He was under the impression that an order was not necessary. But when the books were examined, it turned out that in all the cases to be found an order had been made. Master Litton always requires an order. I do not see any objection to a defendant's bidding without an order if he has not the carriage of the decree. But it may be as well in this case to make the order, as there is a doubt on the practice (b).

April 17.
Judgment.

(a) 7 Ir. Eq. Rep. 633.

(b) See Smith's Chan. Prac., vol. 2, p. 186; Dobbs on Judicial Sales, 18.

1847.

Rolls.

FARRAN v. SMITH.

In re SHERRYS, Minors.

April 19, 20, 27.

Devise of houses to executors in trust to receive the rents for the support, clothing, maintenance and education of the testator's children until they should respectively attain the ages of twenty-one years or marriage, and from and after which, to A, B and C, or such of them as shall be then living. *Held*, that the devise to A, B and C did not take effect in possession until after all the children attained twenty-one or married.

Quære—Whether there was an intestacy as to the surplus rents beyond what was necessary for the maintenance and education of the children during their minorities?

ANDREW SHERRY being possessed of six houses in Mary's-lane in the city of Dublin, for terms of years, made his will bearing date the 19th of November 1825, the parts of which material to the question now before the Court were in the following words:—

"I give and bequeath unto my dear wife Mary Anne Sherry all that my six dwelling-houses, messuages or tenements with the reves thereto belonging, No. 5, No. 6, No. 63, No. 64, No. 65, No. 66, situate in Mary's-lane, in the city of Dublin, and the issues and profits thereof for and during the term of her natural life; in trust nevertheless that my said wife shall support, maintain, clothe, school and educate my daughters Bridget, Mary Anne and Anne, and my sons Andrew and Nicholas, until my daughters shall be respectively married with the consent of my executors hereinafter named, and of my said wife, and until my said sons shall be apprenticed and settled in business by my said executors; but in case my said wife shall intermarry, or that my said executors shall be satisfied of such marriage, then from and after the solemnization of such marriage, or well founded suspicion thereof, I give, devise and bequeath unto my said dear wife the dwelling-houses Nos. 5 and 6 in Mary's-lane aforesaid, for her sole use for the full term for which I hold the same; and I then devise and bequeath to my said executors my said four dwelling-houses Nos. 63, 64, 65, and 66, situate in Mary's-lane aforesaid, hereinbefore bequeathed to my said wife for her life or until she shall intermarry as aforesaid, in trust that my said executors shall from thenceforth receive the rents, issues and profits thereof for the support, clothing, maintenance and education of my said children hereinbefore named, upon the like conditions, until they shall respectively attain the ages of twenty-

one year, or day of marriage, whichever shall first happen; and from and after the death of my said wife unmarried, then I order and direct, and my will is, that my executors shall receive the issues and profits out of my said six dwelling-houses, Nos. 5, 6, 63, 64, 65 and 66, situate at Mary's-lane aforesaid, and apply the same to the support, maintenance, clothing and education of my children Bridget, Nicholas, Mary Anne, and Anne, until my said daughters shall be married, and from and after which then I give, devise and bequeath the said dwelling-houses to my sons Walter, Andrew and Nicholas, or such of them as shall be then living, to be equally divided between them, share and share alike, for their sole use."

The testator died in January 1826, leaving his widow Mary Anne Sherry and seven children, viz., Catherine, Bridget, Walter and Andrew children of a former marriage, and Nicholas, Mary Anne and Anne children of his marriage with Mary Anne Sherry. Shortly after the testator's death his widow married James Farran, and thereupon became entitled to the two dwelling-houses Nos. 5 and 6 absolutely, and the executors became entitled to the rents of the other houses in trust for the maintenance and education of the children of the testator named in his will. The children were made wards of Court, and a receiver was appointed over the houses. The bill was filed for an account of the testator's personal estate by the Master's direction.

Nicholas died unmarried and under age in 1833. Bridget died in 1839, having previously attained age. Walter died in 1830. Catherine was also dead. Mary Anne and Anne the youngest of the children, who attained age in July 1844, were still alive.

Under an order of the 23rd of December 1844, the receiver invested a sum of money in the purchase of £409. 0s. 1d. Government £3½ per cent stock. The sum so invested was produced by the surplus rents of the four houses Nos. 63, 64, 65 and 66 from February 1835, when Mary Anne Sherry married, to the period when Anne Sherry attained age in 1844.

By an order made in this cause and matter on the 4th of December 1845, it was referred to the Master to enquire and report who was entitled to the said sum of £409. 0s. 1d., and the dividends

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Statement.

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—
Statement.

thereon, and who was then entitled to the said houses in Mary's-lane or the rents and profits thereof, the said Anne Sherry undertaking to set up representatives to Walter Sherry, Bridget Sherry and Nicholas Sherry, in case the Master should be of opinion that such representatives were necessary to enable him to report the rights of the parties in the cause and matter.

Anne Sherry filed a charge under this order, charging that inasmuch as the testator Andrew Sherry had made no disposition of the said houses numbered 63, 64, 65 and 66, in the event, which had happened, of his widow marrying again, save the limited disposition of the rents to his executors during the minority of his children, she the said Anne Sherry was entitled as one of the next-of-kin of her father and her deceased brothers and sisters to a distributive share of the rents of the said houses.

Andrew Sherry by his discharge denied that Anne Sherry was entitled to the said sum; but on the contrary insisted that the entire sum was exclusively his property; and that according to the true construction of the will, the only interest that Anne Sherry took in the four houses was a right to be maintained out of the rents during her minority; that subject to such right of maintenance the rents and profits were either given absolutely to Andrew Sherry as the only son of the testator alive when Anne Sherry attained twenty-one, or given in equal shares to him and Walter Sherry, the only sons of the testator who attained twenty-one, and therefore that he was entitled either to the whole or a moiety of the said houses and stock.

The Master by his report found that Anne Sherry was entitled to the stock and the dividends, and to the balance, if any, which should appear in the hands of the receiver when he should have passed his account, being rents which accrued due during the minority of said Anne Sherry and received by him, and he found that the said Andrew Sherry was entitled to the houses Nos. 63, 64, 65 and 66, under the limitation in the will of his father Andrew Sherry. Andrew Sherry objected to the report, on the ground that the Master should not have found that Anne Sherry was entitled to any part of the stock or dividends, or to any portion of the

balance in the receiver's hands, but that Andrew Sherry was entitled to the said stock, dividends and balance.

Mr. O'Callaghan and Mr. Deasy, in support of the objections, cited *Cripps v. Wolcott* (a); *Salisbury v. Petty* (b); *Buckle v. Fawcett* (c); *Boraston's case* (d); *Doe v. Lea* (e); *Hervey v. M'Laughlin* (f); *Jones v. Mackilwain* (g).

Mr. Tudor and Mr. Hamilton Smythe, contra, cited *Barton v. Cooke* (h); 2 *Roper on Legacies*, p. 433; *Nevill v. Nevill* (i); *Cope v. Wilmot* (k).

THE MASTER OF THE ROLLS.

This case comes before me on objections to the Master's report. The question depends on the will of Andrew Sherry, who being possessed of six dwelling-houses situate in Mary's-lane, in the city of Dublin, which he held for certain terms for years, bequeathed them to his wife for life, on trust nevertheless that she should support, maintain, clothe, school and educate his three daughters and two sons (whom he named) until his daughters should be married with the consent of his executors and of his wife, and until his sons should be settled and apprenticed in business by his executors. But in case his wife should marry and his executors should be satisfied of such marriage, then after the marriage, or a well founded suspicion thereof, he bequeathed to his wife two of his dwelling-houses Nos. 5 and 6, for her sole use, for the full term for which he held the same, and he then devised to his said executors his "said four dwelling-houses Nos. 63, 64, 65 and 66, situate in Mary's-lane aforesaid, hereinbefore bequeathed to my said wife for her life, or until she shall intermarry as aforesaid, in trust

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FARRAN
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Argument.

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Judgment.

- (a) 4 Mad. 11.
- (c) 4 Hare, 536.
- (e) 3 T. R. 41.
- (g) 1 Rus. 220.
- (i) 2 Vern. 430.

- (b) 3 Hare, 93.
- (d) 3 Rep. 19.
- (f) 1 Price, 264.
- (h) 5 Ves. 461.
- (k) Amb. 704.

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Judgment.

that my said executors shall thenceforth receive the rents, issues and profits thereof for the support, clothing, maintenance and education of my said children hereinbefore named, upon the like conditions, until they shall respectively attain the ages of twenty-one years or day of marriage, whichever shall first happen." The will then provided that after the death of his wife unmarried (an event which did not take place), his executors should apply the rents of the six dwelling-houses for the support, maintenance and education of his said children until his daughters should be married; "and from and after which, then I give and bequeath the said dwelling-houses to my sons Walter, Andrew and Nicholas, or such of them as shall be then living, to be equally divided between them share and share alike, for their sole use." The words "from and after which," and the word "then," refer either to the marriage of all his daughters, an event which has not taken place, or to the previous clause, *i. e.* from and after the period of his said children attaining twenty-one or marrying.

The Master has adopted the latter construction, and has found that the four dwelling-houses belong to Andrew, the other two sons having died several years ago, and the youngest daughter Anne having attained twenty-one in July 1844.

There is no objection to the Master's report in respect of that finding, and it is not necessary therefore that I should give my opinion upon the point.

The material question raised by the objection is,—whether Andrew the surviving son took any estate or interest in the four houses during the minorities of the daughters, that is previously to July 1844,—the fund in dispute being the surplus rents received by the receiver during such minorities, after providing for maintenance, clothing and education. It has been contended on behalf of Andrew that the effect of the will taken altogether was, that on the death of the testator his three sons took estates vested in possession, as well as interest, subject to the trust for maintenance contained in the previous part of the will; and that therefore any surplus after providing for the maintenance, clothing and

education belonged to the sons. I am of opinion that is not the true construction.

The language of the will is: "from and after which, *then* I give and bequeath the said dwelling-houses to my sons Walter, Andrew and Nicholas, or such of them as shall be *then living*." I am called on to omit the words "from and after which" and the words "then living," which point to the expiration of the particular period of time during which the previous estate is limited on certain trusts.

I am of opinion upon the whole that the Master was right, and that the estate of Andrew (if any) did not take effect as an estate in possession during the minority of his sister Anne Sherry.

With respect to the objections to the finding that Anne Sherry is now entitled to the sum of £409. 0s. 1d. Government £3½ per cent. stock and the dividends thereof, and that the Master should not have stated or found that the said Anne Sherry was entitled to any part of said stock or dividends, those objections are too wide, and must be overruled, if Anne Sherry, on the true construction of the will, would be entitled to any portion of the rents. The question, whether there was an intestacy as to the surplus rents after providing for the maintenance of the children has not been raised by the objections. It was insisted that Andrew was entitled to the whole of the £409. 0s. 1d., and Anne to nothing. That argument was on the assumption that the devise to him or his brothers was to take effect in possession on the death of the testator, subject to the trust for maintenance, which I have already stated is not in my opinion the true construction of the will.

Whether there was or was not an intestacy as to the surplus rents may be a question of some doubt. The devise was of the four houses "to my said executors" in trust "that my said executors shall from thenceforth receive the rents, issues and profits thereof, for the support, clothing and education of my said children hereinbefore named, upon the like conditions, until they shall respectively attain the ages of twenty-one years or marriage, whichever shall first happen." The rents received formed a fund which was more than sufficient to perform the trust.

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Judgment.

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 ———
Judgment.

In *Hamley v. Gilbert* (a) the direction was for payment of the residue to Elizabeth Garnet Hamley, to be by her applied for the purposes thereafter mentioned. And after giving pecuniary legacies to several persons, the testatrix declared her will to be, that the residue of the money arising from the estates and effects therein before directed to be paid to the said Elizabeth Hamley should be laid out and expended by her at her discretion, for or towards the education of her son Francis Gilbert Hamley, the testatrix's godson, and that she should not at any time thereafter be subject to account to her said son, or to any other person whatever for the disposal or application of such residue or any part thereof. The Master of the Rolls in giving judgment treated it as a case of difficulty. He said, "The next-of-kin and the heir-at-law contend that there is an intestacy as to part. It is much more easy to negative any one of these claims than to say which of them ought to prevail, though with regard to the heir-at-law and next-of-kin there is a gift of the residue which is evidence against an intestacy; there are also indications of a limited bounty to the heir-at-law, and of bounty to the next-of-kin." And after going through several authorities he says, "If money be given to pay his schooling expenses it would entitle him to that, but would not raise an implication in his favour beyond it. If £10,000 were given to purchase him a commission in the army, it would be more than would be applied to that purpose. He would be entitled to a commission but not to any thing further;" and he held that Elizabeth Hamley was entitled to the residue.

The reason of that case is inapplicable to this. Here the sons were not the trustees. If the devise had been to Andrew to provide maintenance for Anne, his sister, that case might have been an authority to show that the rents beyond what was sufficient to provide for her maintenance would belong to him. But it is no authority where the property was not devised to Andrew or to his brothers until a period subsequent to the accruer of these very rents in dispute, his sister Anne not having attained her age until

(a) Jac. 354.

July 1844. The question raised by the objections is, whether Andrew is entitled to the whole of the fund or not? I am of opinion that he was not entitled to the whole. If he is entitled to any portion of it, it must be on the ground of intestacy. That question was not raised either before the Master or before me. I shall therefore overrule the objection.

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FARRAN
v.
SMITH.
Judgment.

DARLING v. MARSH.

MR. LAWLESS moved under the 82d Rule that the bill in this cause be dismissed with costs for want of prosecution.

Mr. Wall, for the plaintiff, stated that he had been discharged as an insolvent since the filing of the bill, and submitted that no costs should be given against him.

Mr. Lawless, in reply, cited *Daniel v. Harding (a)*, *Kilminster v. Pratt (b)*.

The MASTER OF THE ROLLS.

I think the proper order is to dismiss the bill without costs, in case the assignee does not file a supplemental bill within a limited time. It would be unjust where an insolvent is deprived of his property by Act of Parliament, and is unable from want of means to carry on the suit, that the Court should fix him with costs for not doing so. The notice of motion is not regular, but I think I may make an order similar to that in *Sharp v. Hullett (c)*.

Where the plaintiff has been discharged as an insolvent after the filing of the bill, the proper order under the 82nd or 83rd Rules is, that the bill be dismissed against him without costs, if his assignee do not file a supplemental bill within a specified time.

Judgment.

Let the assignee of the plaintiff, within three weeks from the date of this order, file a supplemental bill, and in

Order.

(a) 1 Y. & C. C. C. 436.

(b) 1 Hare, 632.

(c) 2 Sim. & Stu. 496.

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default of such bill being filed within such period, let the plaintiff's bill in this cause stand dismissed without costs as to said defendant.

Rolls Motion Book, 247, fol. 195.

See acc. *Nugent v. Palmer*, 2 Ir. Eq. Rep. 220.

JAMES O'HARA and JOHN BURKE

v.

THE ECCLESIASTICAL COMMISSIONERS and
THOMAS F. STRANGE.

April 23, 28.

The bill stated that the lands of B, part of which contained one hundred and fifty-nine acres, and part forty-six acres, had been for many years previous to 1794 held by the same tenants, so that the boundaries became confused. That in 1804 A was seised in fee of the one hundred and fifty-nine acres, and held the forty-six acres under a lease from X for a term. That the mearings and boundaries of the forty-six acres had not since been ascertained, the entire of the lands having been since the lease, as they had been for one hundred years before, held by the same persons, who were owners of the fee-simple lands. That they had been so mixed up, that it was impossible to discover the boundaries or to ascertain where the forty-six acres were situated. The bill, after deducing the title of the plaintiff from A, stated that the defendant claimed to be entitled to the forty-six acres as assignee of X, and that the plaintiffs' interest under the lease had determined, and prayed a petition or a commission to ascertain the boundaries. *Held*, on demurrer, that it could not be sustained for a partition, as no title to a partition at law was shown, nor as a bill to ascertain boundaries as the parties were independent proprietors, the inference being that the defendant was in possession of the forty-six acres, and that the owner of the fee-simple lands and not the defendant was responsible for the confusion of boundaries.

A partition will be decreed in equity only where the plaintiff would be entitled to a partition at law.

Confusion of boundaries, unless it arose from the defendant's misconduct, is not *per se* a ground for a bill to ascertain boundaries.

were seised in fee thereof in right of the bishoprick ; and that being so entitled, by lease bearing date the 3rd of October 1804, and made between Peter Strange of the one part and Edward Murphy of the other part, Peter Strange demised to Edward Murphy all that part of the lands of Busherstown being augmentation lands granted by the See of Ossory to the Crown, the mearings and boundaries of which were therein stated to be then unascertained, to hold from the 29th of September then last past, for the term of seventy-three and a-half years, provided John Burke, Robert Burke and Elizabeth Green, or the survivors of them, should so long live, subject to the yearly rent of £49. 1s. 4d., payable on every 25th of March and 29th of September.

The bill then stated that the mearings and boundaries of the said last mentioned lands had not been since ascertained, the entire of the said lands of Busherstown having been since the date of the lease, as they had been for one hundred years before, held by the same persons who were owners of the fee-simple lands so vested in the said Edward Murphy. That the said Edward Murphy being seised in fee of the said one hundred and fifty-nine acres, and being likewise in possession of the said augmentation lands, portion of the lands under the lease of the 3rd of October 1804, made his will, and devised the lands to three trustees, subject to the payment of several legacies, to the use of his son Edward Murphy, and the heirs of his body lawfully to be begotten. That Edward Murphy died in 1807, and that Edward Joseph Murphy proved his will, and in Michaelmas Term 1807 levied a fine and suffered a recovery of the lands to the use of himself in fee. That by deed of mortgage of the 31st of October 1804, Edward Joseph Murphy granted and released to James O'Hara, one of the plaintiffs, the fee-simple lands, and the augmentation lands, the mearings and boundaries of which were then unascertained, subject to redemption. That Edward Joseph Murphy died on the 10th of August 1841, having by his will bearing date the 11th of April 1818 devised all his real and personal estate to William Burke and the plaintiff John Burke, in trust to pay and discharge all his debts and legacies, with power to mortgage or sell any part of the real estates they should deem advisable

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Rolle.
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Statement.

in order to provide a fund for the discharge thereof. That William Burke died, leaving John Burke the plaintiff surviving him, who proved the will.

The bill then stated that the estate of the Bishop of Ossory in the lands contained in the lease of the 3rd of October 1804, had since become vested in the Ecclesiastical Commissioners. That Peter Strange died in the year 1810, having devised all his real and personal estates to his eldest son Lawrence Strange. That Lawrence Strange continued in possession of the rents and profits of the said lands of Busherstown up to some time previous to his decease in February 1845; and that the defendant Thomas Fitzgerald Strange then claimed to be entitled to the said lands, and the rents and profits of the said lands, as the assignee of the said Lawrence Strange under some deed of conveyance of the nature and purport of which the plaintiffs were ignorant. That the lives named in the lease of the 30th of October 1804 having all died, the plaintiff's interest in said lands thereby demised, containing about forty-six acres, determined.

The bill then stated that the Master reported in a certain suit, instituted for the payment of the debts of Edward J. Murphy, that it would be for the benefit of the parties in said cause that a bill should be filed to enforce a partition of the said fee-simple lands of Busherstown decreed to be sold in said cause, from the other lands of Busherstown.

The bill prayed a commission to distinguish and ascertain the boundaries of the respective portions of said lands, and that if the boundaries could not be ascertained, a commission in the nature of a writ of partition might issue to set out the portion of the said lands to which the plaintiffs were entitled, and to which of said lands the defendants and all other persons should appear entitled; and that a fair and just partition might be made between them, in order that their respective proportions thereof may be allotted to each in severalty, and in order that proper mearings and boundaries might be laid out between their respective shares, and that possession of such particular lands as might be allotted to the plaintiffs might be delivered to them.

The defendant Thomas Fitzgerald Strange demurred to the bill,

and stated as cause of demurrer that it did not distinctly appear whether the bill was intended to be a bill for partition, or a bill to settled confused boundaries; and also because the bill prayed that the several parties plaintiffs and defendants might be declared entitled to have a partition and henceforward hold their several shares in severalty, although there was no averment in the bill that the said parties were at the time of the filing of the bill seised in undivided moieties, and therefore no sufficient privity of estate or unity of title was shown to warrant the institution of a partition suit between the parties named in said bill; and also that it appeared expressly and by distinct averments that the alleged confusion of boundaries took place upwards of one hundred years before the filing of the bill, and therefore long prior to the alleged accruer of the original title under which the defendant was said to have become entitled an assignee of the said lands and premises; and also that it did not appear by the bill that the defendant ever contributed in anywise to the said supposed confusion of boundaries, or ever stood in the relation of tenant to the plaintiffs, so as to make it his duty towards them to preserve the boundaries of the lands undefaced, and that the bill was ambiguous and uncertain in its frame—a mere fishing and ejectment bill, and that the plaintiffs were improperly joined, and that it did not appear that the defendant was a party to the proceedings in the cause wherein it was directed that the present suit should be instituted.

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Mr. *Foley* and Mr. *Hughes*, in support of the demurrer, cited *Wake v. Conyers* (a), *Speer v. Cawter* (b), *Miller v. Warming-ton* (c). As to the costs, *Lund v. Blanshard* (d).

Argument.

Mr. *E. Blackburne* and Mr. *Brewster* contended that the confusion of boundaries having arisen during the time when the defendants, or those under whom they claimed, were entitled to the lands, and therefore by their default, the bill was maintainable. That the demurrer was to the whole bill, and therefore if the

(a) 2 Cox, 360.

(b) 2 Mer. 410; S. C. 17 Ves. 216.

(c) 1 Jac. & W. 485.

(d) 4 Hare, 23.

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 O'HARA
v.
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plaintiff was entitled to any relief it must be overruled. That there was no remedy at law by ejectment by reason of the confusion of the boundaries: and that it appeared by the bill that the lease had expired, and that the representatives of the lessee could not give up the lands unless the boundaries were ascertained.

April 28.
Judgment.

THE MASTER OF THE ROLLS.

The bill in this case was filed for a partition, and also for a commission to ascertain the boundaries between certain portions of the lands mentioned in the bill. It appears from the facts detailed in the bill that the lands of Busherstown, part of which contained one hundred and fifty-nine acres, and another part of which contained forty-six acres, had been held for many years previous to 1794 "by the same tenants who held the other parts of the lands of Busherstown hereinafter mentioned, so that the boundaries of the said lands became confused." In 1804 Edward Murphy was seised in fee of the one hundred and fifty-nine acres, and held the forty-six acres as lessee for seventy-three and a-half years, determinable on three lives. The bill states, "that the mearings and boundaries of said last-mentioned lands have not been since ascertained, the entire of the said lands of Busherstown having been since the date of the said lease, as they had for one hundred years before it, held by the same persons who were owners to the said fee-simple lands." In another part of the bill it is stated, "that the said forty-six acres being for a considerable time held in common with the remaining portions of said lands, had become so mixed up with the fee-simple lands of Busherstown that it was impossible to discover the mearings and boundaries of same, or to ascertain where said forty-six acres were situated." I think the fair inference from the statements in the bill is, that the owner in fee being also lessee of the forty-six acres was responsible for the confusion of the boundaries; but if the matter was in doubt, I should be bound to adopt the rule of construing the statements most strongly against the pleader.*

* See 2 Phil. 28, 212, 220; 2 My. & Craig, 155, 422; 1 Craig & Phil. 95; 4 Hare, 30.

The bill then proceeds to deduce the title of the plaintiff and defendant, and contains a statement to this effect:—"That the defendant Thomas Fitzgerald Strange now claims to be entitled to the said lands (*i. e.* the forty-six acres) and the rents and profits thereof, as assignee of the said Lawrence Strange, under some deed of conveyance of the nature and purport of which your suppliants are ignorant, and that the said lives so named in the lease of the 30th of October 1804 having all died, your suppliants' interest in the said lands thereby demised, being as your suppliants charge about forty-six acres, determined." The bill does not state specifically who is in occupation of the forty-six acres. It merely states in general terms that the lease of 1804 was determined, and that Strange claims to be entitled to the lands from the lessor. But I think that the inference from the statement is, that Strange, who became entitled to the possession on the determination of the lease, is in the occupation of the forty-six acres. It is clear at law that the owner of lands is *prima facie* to be presumed to be the occupier of them: *Stott v. Stott* (a); *Bullard v. Harrison* (b); *Carew v. Stewart* (c). In *Carew v. Stewart*, Bushe, C. J., said, "In *Newling v. Pearce* (d), Bayley, J., lays it down that ownership is evidence of occupation; and in *Bullard v. Harrison* (e), Lord Ellenborough says that alleging a seisin in fee implies occupation, unless the contrary be proved." The same doctrine is laid down in *Stott v. Stott*, and therefore though the bill is obscure and does not state who is in the occupation of the lands, yet as it states that the lease of 1804 was determined and the lessor's interest vested in the defendant Strange, I think I must infer that he is in possession of the forty-six acres. Indeed if the matter is in doubt it is to be taken against the pleader. Lord Cottenham, in the case of *Columbine v. Chichester* (f), states that, "The presumption is always against the pleader, because the plaintiff is presumed to state his case in the most favourable way for himself, and therefore if he has left any thing material to himself in doubt, it is assumed to be in favour of the other party."

(a) 16 East, 343.

(c) 2 H. & B. 463.

(e) 4 M. & S. 92.

(b) 4 M. & S. 87.

(d) 1 B. & C. 442.

(f) 2 Phil. 28.

1847.
Rolls.
O'HARA
v.
STRANGE.
Judgment.

1847.
Rolls.
 O'HARA
 v.
 STRANGE.
 Judgment.

The bill prays a partition. As a bill for a partition it appears to be clearly open to the demurrer. In *Miller v. Warmington* (a) Sir Thomas Plumer laid down that "partition can only be between terre-tenants, tenants in common, or co-parceners, who derived that name from being able to compel partition;" and after adverting to the statute of *Hen. 8*, he added, "the same rules that prevail at law are adopted in equity, and it is only on the same grounds that you can apply to the Court."

As a bill to ascertain boundaries, it appears to me to be equally open to demurrer. In the same case of *Miller v. Warmington* it was held that a termor, having by himself or his undertenants suffered the boundaries between the demised premises and contiguous lands of his own to become confused, was not entitled, after the expiration of the term, to a commission to ascertain them in opposition to the assignee of the lessor, who then entered and had since continued in possession of both, it not being shown that such possession was improperly obtained. The Master of the Rolls says, "This is the case of persons claiming by an adverse title; there is no connection between them to serve as a foundation for the Court to proceed on in ordering a commission. The subject was very luminously considered by the late Master of the Rolls in *Speer v. Crawler* (b); and that case has settled that you must lay a foundation for this species of relief, not merely by showing that the boundaries are confused, but that the confusion has arisen from some misconduct on the part of the defendant, or those under whom he claims, of which you have a right to complain, and which renders it incumbent on him to co-operate in re-establishing them. But the Court will not interfere between independent proprietors, and confusion of boundaries *per se* is no ground to support such a bill."

That case appears to be in point. This bill is, in fact, an ejectment bill.

I shall therefore allow the demurrer with costs, but shall retain the bill for a fortnight in order to give the plaintiff an opportunity to amend.

(a) 1 Jac. & Wal. 493.

(b) 2 Mer. 410.

1847.

Rolls.

MARK v. WILLINGTON.

April 28.

AFTER service of a notice to dismiss the bill for want of prosecution under the 82nd Rule, the plaintiff amended his bill by making Frederick Willington a party, and by adding some additional charges, in order to meet objections which had been raised by the answer. The draft of the amendments had been prepared by Counsel before the notice to dismiss the bill was served.

Amendments of the bill had been prepared by Counsel before, but were not made until after notice to dismiss the bill for want of prosecution. *Held*, no answer to the motion.

Mr. *W. Smith* moved to dismiss the bill, with costs, for want of prosecution, contending that the amendments were irregular, and no answer to the motion: *Dycers v. Golding (a)*; *Price v. Webb (b)*.

Argument.

Mr. *Tuthill*, for the plaintiff.

The MASTER OF THE ROLLS stated that the amendments of the bill, after the notice of the motion to dismiss, was no answer to the motion under the 82nd General Order. But if the plaintiff was satisfied to strike out the amendments and file a replication, he might do so.

Judgment.

The plaintiff so desiring, the following order was made:—

Order.

The plaintiff undertaking to file a replication within two days from the date of this order, no rule; and let the plaintiff be at liberty to amend the bill in this cause by striking out the name of Frederick Willington, and the amendments made therein within the last month; and let the plaintiff pay the defendants £5 for their costs of this application, and in default of such replication being filed within that period, be it so pursuant to the notice.

(a) 2 Ir. Eq. Rep. 27.

(b) 2 Hare, 515.

1847.

Rolls.

GARVEY v. HAYES.

April 28.

Under the 75th Rule the plaintiff has six weeks to except to the answer to an amended bill for insufficiency.

THE bill in this cause was filed on the 1st of March 1846, for the administration of the estate of Thomas Garvey, deceased. The answer of the defendants Hayes and wife was filed on the 10th of June 1846. On the 5th of November 1846, the bill was amended by putting in issue a settlement entered into on the marriage of the defendants Hayes and wife, who answered the amendments on the 25th of January 1847. This was the last answer filed.

On the 10th of April 1847, the plaintiff served notice of a motion to amend the bill a second time.

Argument.

Mr. *Lyons* moved accordingly.

Mr. *J. E. Walsh*, for the defendants Hayes and wife.

The application is too late. By the 50th Rule no order to amend the bill "shall be made after the expiration of six weeks from the period that the answer of the defendant, if there be but one, or that the last of the answers, if there be two or more defendants, is to be deemed sufficient." By the 75th Rule the plaintiff shall "be allowed fourteen days from notice duly served that the second or third answer is filed, to serve notice that the further answer is insufficient." The second answer in this case was sufficient on the 10th of February 1847, more than six weeks before service of the notice. Where, after exceptions are allowed, the plaintiff under the 54th Rule enters and serves a side-bar rule, that the defendant answer the amendments and exceptions at the same time, he has only fourteen days to except to the answer under the 75th Rule.

Mr. *Lyons*, in reply.

By the 75th Rule the plaintiff has six weeks to except to the answer to an amended bill. "Further answer" does not mean an

answer to an amended bill, but an answer to a bill after exceptions allowed. The plaintiff had twelve weeks from the filing of the last answer on the 25th of January to serve notice to amend the bill.

The MASTER OF THE ROLLS.

I think the plaintiff has by the 75th Rule six weeks to except to an answer to an amended bill. The notice to amend the bill was therefore served in time.

1847.
Rolls.
GARVEY
v.
HAYES.
Judgment.

JOHNSTON v. TOTTENHAM.

April 28.

An order *ex parte* was made in this cause on the 12th of December 1846, that service of subpoena and notice on Mr. H. P. Woodroffe, the alleged solicitor of the defendant Charles Tottenham, and transmitting copies thereof through the Post-office directed to N. Sewell, Esq., 3 Temple Chambers, Fleet-street, London, be deemed good service thereof on the said defendant, serving and transmitting a copy of this order at the same time. The affidavit on which this order was obtained stated the deponent's belief that Charles Tottenham was resident out of the jurisdiction, and stated that Mr. Woodroffe was his attorney in the transactions which this suit related to. A subpoena was served in pursuance of this order, requiring the defendant to appear within eight days of the service of the writ, and the notice served at the same time required him to answer in two months. The defendant not having appeared,

The defendant residing out of the jurisdiction, an order was made on the 12th of December to substitute service of subpoena and notice on W., the solicitor for the defendant in the transactions to which the suit related. But the order did not state when the defendant was to appear, as required by the 31st General Order when the subpoena is served out of Ireland. The

subpoena required the defendant to appear in eight days and to answer in two months. A side-bar rule having been entered by the plaintiff, a parliamentary appearance was entered on the 8th of January. On the 12th of March the defendant entered a common appearance. *Held*, that if the order of the 12th of December was irregular in not stating where the defendant was to appear, the irregularity was waived by the common appearance.

But *semble*, the proceedings were regular, for where an order is made under the general authority of the Court, to substitute service on the solicitor of a defendant, such defendant residing out of the jurisdiction, the service is to be considered a service within the jurisdiction, and the defendant must appear and answer within the time limited by the 31st General Order, as mentioned in the notice.

1847.
Rolls.
 JOHNSTON
v.
 TOTTENHAM.

a parliamentary appearance was entered under the 33rd General Order as upon a service within the jurisdiction, on the 8th of January 1847. On the 12th of March 1847, Charles Tottenham entered a common appearance. On the 10th of April the plaintiff served notice to take the bill as confessed against the defendant Charles Tottenham, and that it might be referred to the Master to appoint a receiver over the lands in the pleadings mentioned.

Argument. Mr. Robert R. Warren moved accordingly.

Mr. John F. Waller, for the defendant Charles Tottenham, moved a cross notice that the service of the subpœna to appear and answer substituted on the said defendant, and the order of the 12th of December 1846, and the notice, with all proceedings thereon, be declared void and set aside as irregular, or otherwise, that the defendant, being resident out of the jurisdiction since the filing of the bill, be allowed three months to file his answer thereto, to be computed from the 12th of April, being the day on which the defendant appeared, and also that the plaintiff, being resident out of the jurisdiction, be stayed from further proceeding in the cause until he gave security for costs.

In support of the latter motion it was contended that the order of the 12th of December being for service on a defendant out of the jurisdiction, was irregular in not stating the time when the defendant should appear and answer, the 31st General Order so requiring. That according to *Wise v. Beresford (a)*, the service, although substituted on a person in Ireland, was to be considered a service out of Ireland, and the subpœna and notice were, therefore, not in conformity with the 31st General Rule. The subpœna should have required the defendant to appear "within a certain time after the service of such subpœna, such time to be mentioned in the order" of the 12th of December 1846. The notice should have required the defendant to answer within three months from the day of appearance.

(a) Fl. & K. 390.

Mr. *Warren*, against the motion, argued that there was no irregularity, the order of the 12th of December being, not for service out of the jurisdiction under the statutes 2 *W.* 4, c. 33, and 4 & 5 *W.* 4, c. 82, but for substitution of service within the jurisdiction, under the general authority of the Court now established by *Hobhouse v. Courtenay* (a). That Mr. Woodroffe having entered an appearance for the defendant, showed the correctness of the order for substitution of service on him as the defendant's solicitor. Even if the proceedings were irregular, the irregularity had been waived by the appearance: *Anonymous* (b); *Floyd v. Nangle* (c); *Bound v. Wells* (d); *Robinson v. Nash* (e); *Daniel's Chan. Pr.*, p. 469, 2nd ed.; and that the application was too late, and should have been made in Hilary Term: *Smith's Rules*.

1847.
Rolls.
JOHNSTON
v.
TOTTENHAM.
Argument.

Mr. *Waller*, in reply, said that the order of the 12th of December was not so much irregular as void, and therefore the principle of waiver would not apply to the case: *Levi v. Ward* (f); *Daniel's Chancery Practice*, 369.

THE MASTER OF THE ROLLS.

If there was any irregularity in the order of the 12th of December 1846, I think it was waived by the defendant's entering a common appearance by the solicitor* on whom the service was made, under the said order of the 12th of December. Where there is a service out of the jurisdiction the plaintiff must apply to the Court, under the 35th General Order, for an order to enter a parliamentary appearance. Where the service is within the jurisdiction the plaintiff enters a side-bar rule, under the 33rd General

Judgment.

(a) 12 Sim. 140.

(b) 2 Atk. 567.

(c) 3 Atk. 569.

(d) 3 Mad. 434.

(e) 3 Anst. 76.

(f) 1 Sim. & St. 324.

* "The defendant is not bound to adopt the parliamentary appearance. He may either come in and move to set aside the proceedings, or he may appear under protest." *Per* Sir Michael O'Loughlen, *Deasy v. O'Connell* (Sau. & Sc. 117, 118.

1847.
Rolls.
 JOHNSTON
 v.
 TOTTENHAM.
 ———
Judgment.

Order, and a parliamentary appearance is entered under such side-bar rule, which was done in the present case: and by the latter part of the 33rd General Order, the defendant may adopt the parliamentary appearance or enter an appearance by his own solicitor, which he accordingly did. The irregularity, if any, was in my opinion waived by such common appearance.

But I do not think that the proceedings were irregular. In *Wise v. Beresford* the order to substitute service was under the 2nd section of the 4 & 5 W. 4, c. 82, and Sir Michael O'Loughlen appears to have considered the service as equivalent to a service out of the jurisdiction, because he made an order that a parliamentary appearance should be entered, which would have been unnecessary in case of a service of a defendant within the jurisdiction (a), a side-bar order being the proper course in such case. The order in *Wise v. Beresford* was made under the 2nd of the General Orders of the year 1839. The question however was not discussed or argued in that case. The 31st of the General Orders of 1843, on which the question in this case turns, directs that "a writ of subpoena to appear and answer, or to revive and answer, when it is served *in Ireland* shall require the defendant to appear thereto within eight days from the service of such writ; and when it is served *out of Ireland* shall require the defendant to appear within a certain time after the service of such subpoena, such time to be mentioned in the order giving liberty to the plaintiff to serve such defendant out of the jurisdiction." And the Order then directs the service of a notice with the subpoena which is to state that in case the answer of such defendant shall not be filed within two months, in case such subpoena is served *in Ireland*, or within three months in case the subpoena shall be served *out of Ireland*, the plaintiff will issue process to enforce the answer, or proceed to have the bill taken *pro confesso* against the said defendant for want of an answer.

The irregularities alleged in this case are, first, that the time for

(a) See 13th General Order of the 29th of November 1834, which was in force when *Wise v. Beresford* was decided.

appearance was not mentioned in the order of the 12th of December; and secondly, that the time mentioned in the notice which accompanied the subpoena stated the period for answering to be two months instead of three months.

1847.
Rolls.
 JOHNSTON
 v.
 TOTTENHAM.
 Judgment.

The subpoena was in fact served in Ireland, but the defendant contends that where a service is made in Ireland under an order to substitute service upon a defendant resident out of Ireland, the service is to be considered to be a service out of Ireland; and that therefore the proceedings were irregular. The order to substitute in this case is sustainable under the general jurisdiction of the Court: *Hobhouse v. Courtenay (a)*; and I think upon the whole, as the subpoena was served within the jurisdiction upon a person whom the Court considered, upon the affidavit made in support of the motion of the 12th of December, was an attorney authorised to appear for the defendant, that I am not bound to consider the service of the subpoena as constructively a service out of Ireland. Whether the case of *Wise v. Beresford* ought to be followed where the order to substitute is under the statute, and not under the general authority of the Court, it is unnecessary to decide.

Under the circumstances, however, as the defendant Charles Tottenham is resident out of the jurisdiction, he may have time to answer until and including the 11th of June. That will be three months from the common appearance. The costs of the motion to be costs in the cause.

(a) 12 Sim. 140; See *Norton v. Hepworth* (Hall & Twell's Rep. 158).

1847.

Rolls.

In re RICHARD WILLIAM WHALEY, *Petitioner* ;
ROBERT WHALEY, *Respondent*.

May, 5, 7.

Where a petition is presented under the Mortgage Act, the mere impeachment of the mortgage by affidavit, without showing probable grounds for such impeachment, is not sufficient to prevent the Court from making the usual reference to appoint a receiver.

Semble, if a bill should be filed to impeach the mortgage, the Court would not distribute the fund received by the receiver until such suit was disposed of.

The case of *Cosgrave v. Gannon*, 3 Ir. Eq. Rep., approved of.

THE petition in this matter was presented for a receiver under the Mortgage Act, 11 & 12 G. 3, c. 10, Irish.

The petition stated, that under certain articles of agreement entered into upon the marriage of John Whaley on the 26th of April 1788, and a settlement subsequently executed on the 13th of March 1813, the lands of Drenenagh and other lands in the county of Armagh were limited to John Whaley for life, with remainder to the respondent for life, and divers remainders over.

On the 21st of October 1821 (John Whaley being then alive) the respondent, by indenture of mortgage of that date, in consideration of the sum of £2630 then due by him to Mary Anne Annette Whaley, and of a further advance by her of £370, conveyed his estate in remainder in said lands to the said Mary Anne Annette Whaley and her heirs, with a proviso for redemption in case the respondent should survive his father, John Whaley, and should pay to the said M. A. Whaley, her executors, &c., the sum of £3000 with legal interest for the same within three calendar months after the death of John Whaley. M. A. Whaley died on the 2nd of January 1847, having bequeathed the mortgage to the petitioner and appointed him sole executor. John Whaley also died on the same day. No sum had ever been paid either to M. A. Whaley or the petitioner, for principal or interest on foot of the mortgage.

The respondent made an affidavit in which he stated that he had no recollection of having ever executed the mortgage, and that if he executed the same he was induced to do so by some contrivance without the knowledge of his father, and without the aid of any legal adviser acting on his behalf. That he never was indebted to M. A. Whaley in the sum of £2630, and that he never applied to her to

lend him a further sum of £370 or any other sum whatever, nor did he ever receive any sum of money from her, a conditional order for the appointment of a receiver having been made.

Mr. *John D. Fitzgerald*, and Mr. *Nelson Hancock*, showed cause.

They argued that the Court should not appoint a receiver summarily where the mortgage was impeached. No machinery was provided by the Act for trying whether there was good reason for impeaching the mortgage. Where a receiver was appointed, the Court must distribute the funds, and could not as in the case of a receiver under the Judgment Acts retain them until a cross-bill was filed. The respondent therefore would be without remedy if a receiver was appointed: *Leahy v. Arthur* (a); *Darcy v. Blake* (b). The observations of Sir Michael O'Loughlen in *Cosgrave v. Gannon* (c) were extrajudicial and opposed to former decisions.

Mr. *Hughes* and Mr. *S. B. Miller*, in support of the order, relied on *Cosgrave v. Gannon*, and contended that the report of *Darcy v. Blake* (which was the only decision against them) was so unsatisfactory as not to be depended on. Even in a foreclosure suit the defendant could not impeach the consideration of a mortgage by answer; he must file a cross-bill: *Carter v. Palmer* (d). On the same principle, the respondent in a petition matter could not impeach the consideration by affidavit.

THE MASTER OF THE ROLLS.

I concur entirely in the opinion expressed by Sir Michael O'Loughlen in the case of *Cosgrave v. Gannon*, that the mere impeachment of a mortgage by affidavit, where a petition is presented under the Mortgage Act, without showing probable grounds for such impeachment, should not prevent the Court from appointing a receiver under the provisions of the Act.

1847.
Rolls.
WHALEY
v.
WHALEY.
Argument.

May 7.
Judgment.

(a) 1 Hog. 92.

(b) 1 Mol. 247.

(c) 3 Ir. Eq. Rep. 433.

(d) 11 Bli. 397.

1847.
Repts.
 WHALEY
v.
 WHALEY.
 ———
Judgment.

The facts of the case of *Darcy v. Blake* are not stated in the report, and Sir M. O'Loughlen having directed a strict search to be made for the petition and order, no trace of them could be found. In this case the respondent does not state that he never executed the mortgage deed; he only says he has no recollection of ever having executed it. In a case of this kind I should, if the respondent required it, allow inspection of the mortgage deed, in order to enable him to swear (subject to all the consequence of his so doing) that he never executed the deed. No application of that kind has been made to me, and Counsel has not been instructed to state positively that the respondent did not execute the mortgage. With respect to the alleged grounds of impeachment of the deed stated in the affidavit (supposing it to have been executed), I think that they are not probable. If a bill had been filed to foreclose the mortgage, and for a sale, the respondent must have filed a cross-bill, unless he disputed his ever having executed the deed; and I am of opinion that in this case the order should be made for the appointment of a receiver, which will not prevent the filing of such a bill. If a bill should be filed, I shall probably not order payment to the petitioner until that suit shall be disposed of.

—◆—

FREEL v. TRANT.

May 7.

Security for
 costs refused
 after the time
 for answering
 had expired.

MR. J. PLUNKET moved that the proceedings be stayed until the plaintiff should give security for costs. The time for the defendant answering had expired before the notice of this motion had been served; but no step had been taken in the cause.

Mr. *John T. Ball*, for the plaintiff, contended that the motion

was too late, the defendant being in contempt for not answering:
Watson v. Pym (a); *Executors of Robinson v. Bradley* (b).

The MASTER OF THE ROLLS.

The late Master of the Rolls has decided that a party cannot move for security for costs after the time for answering has expired. I shall act upon that decision. Perhaps it would have been better to have followed the English practice and to grant the motion, unless a step had been taken in the cause; but alterations in the practice are inconvenient, and I shall follow the practice established in this Court, and shall therefore refuse this motion.

(a) 2 Ir. Eq. Rep. 26.

(b) 5 Law Rec. N. S. 9.

1847.
Rolls.
FREEL
v.
TRANT.
Judgment.

STEPHENS v. O'SHAUGHNESSY.

THE bill was filed against six persons, two of whom were charged to be out of the jurisdiction, and process was prayed against them when they should come within the jurisdiction. The bill had been dismissed against three of the defendants who were within the jurisdiction. The replication was filed only against the fourth defendant, who was within the jurisdiction.

May 8.
The replication should not be filed against persons against whom process is prayed, only when they come within the jurisdiction.

Mr. Kernan moved to take the replication off the file as irregular, and that the bill might be dismissed for want of prosecution.

Argument.

Mr. B. C. Lloyd, for the plaintiff, argued that the replication was regular, that the persons against whom the bill had been dismissed were no longer parties, and as to the persons who were out of the

1847.
Rolls.
 STEPHENS
v.
 O'SHAUGH-
 NESSY.

jurisdiction, they were not parties until they came within the jurisdiction. There was no issue knit with them. The replication could not be filed against parties who had not answered, and with whom no issue had been joined, and was regular as it stood. The motion therefore should be refused.

Judgment.

The MASTER OF THE ROLLS refused the motion, with costs.

KEOGH, *Petitioner* ; CATHCART, *Respondent*.

VALENTINE *v.* MIDDLETON.

May 7, 11.

Sequestration may be awarded against the separate estate of a married woman for costs given against her.

Statement.

A motion was made in this matter and cause on behalf of Mrs. Sarah Keogh, the wife of William L. Keogh the petitioner, by her next friend, that the writ of sequestration issued in the cause and matter against the said Sarah Keogh, with W. L. Keogh, her husband, on the 16th of December 1846, might be set aside for irregularity; and also that the side-bar rule of the same date, directing the tenants of certain lands in the county of Meath to pay the rents to the sequestrators in said order named, might be set aside, on the ground that the sequestration issued imprudently and improperly against the said Sarah Keogh, she being a married woman; and also that, as regarded her, it issued without any proceedings having been taken to ground the writ of sequestration; and also on the ground that the order of the 16th of December was irregular, inasmuch as there was not any order duly appointing the sequestrators therein named, nor were any recognizances entered into by the sequestrators; and that the sequestrators might be restrained from interfering with the tenants or the receipts of the rents of the said lands,

and that Mrs. Keogh might be at liberty, notwithstanding the sequestration, to receive the rents as she might be advised.

1847.
Rolls.
KEOGH
v.
CATHCART.

The sequestrators had been appointed over lands which were settled to the separate use of Mrs. Keogh, the writ of sequestration having been obtained under the circumstances fully stated in the judgment of the Master of the Rolls.

Mr. *Butt* appeared in support of the motion.

Argument.

Mr. Serjeant *Warren* and Mr. *Robert C. Walker* opposed it.

The principal arguments are adverted to in the judgment.

The following cases were cited:—*Johnston v. Biron* (a); *Hogan v. Morgan* (b); *Jones v. Champion* (c); *Beames on Costs*, p. 66; *Murray v. Bailee* (d); *Jordan v. Jones* (e).

THE MASTER OF THE ROLLS.

May 11.
Judgment.

In this case of *Keogh v. Cathcart* an application was made, a few days ago, to set aside a sequestration for irregularity. The facts of the case appear to be these:—In June 1846 an application was made by petition, which put forward very serious charges against Mr. Cathcart as a solicitor of the Court. That petition, which I have read over, related in a great measure to the separate estate of Mrs. Keogh, her rights to which were put forward on the petition. It was presented by William L. Keogh and Sarah his wife, and purports to be signed by both. The signature is not, I believe, in her handwriting, but in that of her solicitor. But it purports to be signed by her, and I shall assume on this motion that the signature was authorised by her. The case came on to be heard before the Lord Chancellor, and the petition was dismissed with costs generally. An attachment was issued against William L. Keogh the husband, for the purpose of levying the amount of the costs, and he was arrested and committed to jail under that attachment. On the

(a) 5 Ir. Eq. Rep. 154.

(b) 1 Hog. 251.

(c) 1 Dick. 160.

(d) 1 M. & K. 222.

(e) 25 L. J. 93.

1847.
Rolls.
 {
 KEOGH
 v.
 CATHCART.
 —
Judgment.

1st of December 1846, Mr. Keogh applied to the Lord Chancellor to set aside the attachment for irregularity, and to be discharged from custody. The notice of motion appears to have been wrongly entitled; but it was made in the petition matter, and the solicitor for Mrs. Keogh cannot take advantage of his own neglect in misentitling the notice, which the order followed. The following order was made on that motion:—"It appearing to the Court from the medical certificates of Drs. Benson and Davis, bearing date respectively the 8th of September and 15th of October 1846, that the further confinement of the said William L. Keogh would be attended with danger to his health, it is ordered that the said William L. Keogh be forthwith discharged from the custody of the marshal of the marshalsea of the Four-Courts, under the attachment issued against him by the respondent G. L. Cathcart for non-payment of the sum of £54. 2s. 2d. But this order to be without prejudice to such proceedings as the said George L. Cathcart shall be advised to take for the recovery of the said sum of £54. 2s. 2d., together with his costs of this application, either out of any funds in Court to the credit of the cause of *Valentine v. Middleton*, or out of any property of the said W. L. Keogh and Sarah his wife, or either of them; he the said W. L. Keogh having, by his Counsel in open Court, refused to accede to the offer of the said G. L. Cathcart to accept payment of his demand out of the funds to be produced by the extension of the receiver in the said cause, over £30 a-year of the rents of the lands and premises in the pleadings mentioned, now in the possession of the said W. L. Keogh and Sarah his wife, to commence from the 1st day of May next: and it is further ordered that the said G. L. Cathcart do have his costs of this application, and be at liberty to add the same to his demand."

Mr. Keogh was discharged under this order, and Mr. Cathcart not having been paid his demand, in pursuance of the liberty so reserved to him by the order of the Lord Chancellor to proceed as he should be advised against the estate of the husband and wife, issued a sequestration on the 6th of December 1846, against the separate estate of this lady, and it is that sequestration which it is now sought to set aside.

The first ground relied on in the argument before me was, that this lady never authorised the petition to be presented in her name. If this be so, the proper course is for her to make an application that the solicitor who used her name without her authority should pay the costs (a).

The next ground for setting aside the sequestration is, that the second order of the Lord Chancellor is not properly entitled "in the matter of W. L. Keogh *and wife* and others, petitioners, and George L. Cathcart respondent." I have already said that I shall not listen to a solicitor saying that he has taken an improper and irregular order which he has acted on, and afterwards making his own irregularity the foundation of an application to the Court. If the order had been made by me, I should have amended the title of it.

The next objection, and that which was mainly relied on is, that a Court of Equity has no authority whatever to award costs against a married woman. I do not see how that objection can be relied on on this motion. No application has been made to set aside or vary the Lord Chancellor's order. I have not power to do so. The Lord Chancellor dismissed the first petition generally with costs. That it was intended that it should be dismissed with costs against all the petitioners, appears from the second order, which reserves the right to proceed for the costs against "any property of W. L. Keogh or Sarah his wife." The Court thus explained the previous order, and it appears to me that the petition was dismissed with costs against this lady. Whether that order was a proper one or not, it was made by the Lord Chancellor, and I cannot interfere with it.

In the case of *Johnson v. Biron* (b) the bill was filed by husband and wife to set aside the sale of certain real estate which the husband claimed in right of his wife. The husband died, and the defendant entered and served a rule that the wife should revive the suit or continue the cause within ten days, or in default, that the bill be dismissed with costs. Before the expiration of the ten

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(a) See 1 Daniel's Chancery Practice, 2nd ed., 294, 295.

(b) 5 Ir. Eq. Rep. 154.

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days she served a notice on the defendant's solicitor, apprising him that she had disclaimed all interest in the suit, and requiring him to vacate the order which directed the bill to be dismissed with costs, inasmuch as it was irregular. The notice was not complied with, and the order was set aside as irregular on the application of the wife. I have no doubt that the Court of Exchequer were quite right in refusing to charge the wife surviving with the costs, under the circumstances of that case. But that case does not decide that where a proceeding is taken in the name of a married woman and by her authority in relation to her separate estate, the Court could not make her separate estate liable to the costs.

In *Hogan v. Morgan* (a) Sir W. M'Mahon says;—"If a bill had been filed on the part of a married woman by her next friend in relation to her separate estate, the Court in administering that property might make a provision for the payment of the costs."

There is a case in 2 *Mol.* p. 384, *Betagh v. Burke*, in which an application was made for pin-money by the defendant's wife, who was not a party in the cause. The notice was in her own name. The Master of the Rolls refused the motion. He said that "if the husband had authorised the motion, though entirely respecting the wife's interest, the costs would have fallen on him; so if made in the name of a next friend, he should have paid the costs; but in the form it had been brought on, the solicitor giving the notice must pay the costs to the plaintiff and to the defendant (except the husband) who had answered; but if the solicitor could find any separate funds of the wife, he was to be repaid out of them, as it is a proceeding taken for her benefit, whereby he became her creditor." That case, in my opinion, shows the authority of the Court to make the separate property of a married woman liable for costs.

The next point raised is, that an attachment cannot issue against a married woman, and therefore that a sequestration which is founded on an attachment cannot be awarded against her separate property. There are many cases at law where proceedings have been taken against married women, by reason of liabilities incurred

(a) 1 *Hog.* 241.

before marriage, and judgment obtained against husband and wife, and the Courts of Law have refused to discharge the wife from arrest under a *ca. sa.* if it did not appear that she had no separate estate. If she has a separate estate, a Court of Law will compel her to do equity, and will not discharge her unless she pays the debt.

In *Sparhes v. Bell* (a), a married woman was taken in execution together with her husband, for a debt due by her before her marriage, and it was held that she was not entitled to be discharged unless it appeared that she had separate property, even although her husband had been discharged under the Insolvent Act.

In *Evans v. Chester* (b), an action had been commenced against a woman while sole; but after service of the writ, and before declaration, she married. The plaintiff proceeded to final judgment, and took her in execution. On a motion to discharge her out of custody the affidavit stated the above facts, and that no settlement had been entered into on the marriage; but it did not state that she had no separate estate. Parke, B., said, "the husband may bring a writ of error. If the action had been against both and execution had issued against both, upon your affidavit she would not be entitled to her discharge, since it does not state that she has no separate property, but only that there was no settlement on the marriage. She might have had property by devise. The affidavit is defective, and the rule must be discharged with costs."

A more recent case, *Ferguson v. Clayworth* (c), establishes the same doctrine. And in the case of *Newton v. Boodle* (d), where an action was brought by husband and wife, and the defendant obtained judgment, it was decided that the wife might be taken in execution for the costs. Thus a Court of Law exercises the power against a *feme covert* to compel her to pay costs out of her separate estate, by refusing to discharge her out of custody where she has been arrested under a *capias ad satisfaciendum*, if she has separate estate, and will not discharge the demand out of such separate estate. In equity, however, you cannot proceed against the person of a married woman.

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(a) 8 B. & Cr. 1.

(c) 6 Q. B. Rep. 269.

(b) 2 M. & W. 847.

(d) 11 Jur. 628.

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The rule is thus laid down by Lord Eldon in *Nantes v. Corrock* (a). He says, "One of the greatest difficulties that has occurred in this Court is how to give any execution against the property of a married woman; and in *Hulme v. Tenant*, Lord Thurlow went no further than the rents and profits of her estate; not as to the estate itself, but clearly not against her person." The course adopted in this case is in conformity with what Lord Eldon lays down, not to proceed against the person of a married woman nor against her estate, but against the rents and profits of her estate; and there is no mode, that I have heard, of proceeding against the rents and profits, except that which has been adopted in this case, viz., by sequestration.

It was argued on the authority of several English cases that a sequestration cannot issue without an attachment. That is not the rule of this Court. Sir Edward Sugden decided (b) that a sequestration might issue without an attachment. He first expressed a doubt on the subject, and granted a conditional order, which was afterwards made absolute. The only argument which could prevail would be, that a conditional order should have issued in this case in the first instance. Perhaps that would be the best course in a case like the present; but that point was not urged before me, and I think the argument is met by the Lord Chancellor's order discharging Mr. Keogh, which expressly states that it is to be "without prejudice to such proceedings as the said George L. Cathcart shall be advised to take for the recovery of the said sum of £54. 2s. 2d., together with the costs of this application, either out of any funds in Court to the credit of the cause of *Valentine v. Middleton*, or out of any property of the said William L. Keogh and Sarah his wife, or either of them."

I should be very unwilling to yield to an objection grounded on an irregularity unless I was coerced to do so. But I think there is no irregularity in this case. There is therefore no ground to set aside the sequestration, and I shall refuse the motion with costs.

(a) 9 Ves. 189.

(b) *In re Powel*, 7 Ir. Eq. Rep. 452.

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(*Chancery.*)

Jan. 20, 21,
22, 25.
April 27.
May 14.

THIS suit was instituted to raise the amount of two judgments. One of the judgments was recovered in Hilary Term 1776 against Murtagh M'Mahon for £100; the other in Trinity Term of the same year against him for the penal sum of £770. The latter was entered on the joint and several bond and warrant of Murtagh and his son Thomas, and a separate judgment was also entered against Thomas for the same debt.

In a suit to raise a judgment after the death of the conuor, seeking the usual accounts of his real and personal estates, it was never necessary, previous to the suit, to sue out an *elegit*.

An account stated between a judgment debtor and his creditor, in which the latter admits payments on account, and a balance is struck of the sum due, cannot, after the death of the parties, be made use of in evidence, as an admission against interest, to prove these payments against third persons.

Proceedings to a custodiam, under which, however, no money was received, irregularly taken by a person equitably entitled to a judgment (under an assignment, no memorial of which was ever registered), are sufficient to prevent the bar of the statute 8 G. 1, c. 4, set up in a suit afterwards instituted by the same person to recover the judgment.

B, the younger son of a judgment debtor, was entitled to part of a charge on his estates, and died in 1792, having made a will, bequeathing the charge to A his brother. A died in 1793, leaving his father his next-of-kin, who died in 1800. A trustee for X, who was entitled to another part of the charge, filed a bill in the Exchequer in 1807. X having taken administration as in case of intestacy to B, the report finding B's charge due to him found, as an admission of the parties, that it belonged to Y, a representative of a sister who was untruly stated to be B's next-of-kin. On X's death Y became B's administratrix, and in another suit in the Exchequer the sum was reported due to her in 1834, she being then also administratrix to the debtor. In 1822 B's will was proved, and administration *cum test. annex.* granted to X's representative. In a suit to raise the judgment, *Held*, that the balance of B's charge could be attached as personal estate of the debtor, the creditor not being bound by the Exchequer proceedings; but that to make it available, accounts should be taken of the estates of B and A, against which the representative of X had claims, and that the Exchequer proceedings did not bind X and Y to admit there were no debts, &c., of A and B.

A cause abated by the plaintiff's death in 1829. A bill of revivor was filed in 1836, and an order to revive made in 1841. *Held*, that it could not be objected that the cause was not effectually continued; and *semble*, there is no rule requiring a bill of revivor for any purpose to be filed within six years of the abatement.

Delay, however great, in the progress of a suit cannot deprive the plaintiff of rights which existed at the time of its commencement.

Though trustees are protected in acting under the decision of a competent tribunal, the protection does not extend to persons receiving payments out of a fund for themselves; and though the decision has been long acted on, it is no protection to such persons against the claims of others not bound by it.

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The original bill had been filed in October 1810 by Terence O'Brien, seeking to raise the amount of the judgments out of the real and personal estates of Murtagh, the conusor, who was then dead. Several amended bills and bills of revivor and supplement were afterwards filed; and the parties became very numerous and the cause exceedingly complicated. It was at length brought to a hearing in 1844 before Sir E. Sugden, who dismissed the bills so far as relief was sought against the real estates of Murtagh M'Mahon, but gave relief in respect of his personal estate, subject to some special directions.

Petitions of rehearing were presented to vary this decree, by persons interested in the personal estate and by the plaintiff. The questions discussed and decided on the rehearing respectively depended on the following facts:—

FIRST—No *elegit* had been issued before the filing of the bill of 1810. It was contended that the bill should be dismissed against the real estates for this reason. The point was not made in the answers. Sir E. Sugden dismissed the bill against several of the defendants interested in the real estates, on this ground; and against this the plaintiff petitioned for a rehearing.

SECOND—The lapse of time between the recovery of the judgments and the filing of the bill of 1810 was relied on as having barred the judgments. One ground put forward to meet this defence gave rise to a question of evidence turning on the following circumstances:—

In 1792 Murtagh M'Mahon, the conusor of the judgments, being greatly embarrassed, had conveyed away some of the estates sought to be now charged with them to his nephew Colonel M'Mahon. The remainder of the estates sought to be now charged were about the same period also conveyed away. All of them had since been made the subject of settlements or conveyances. The defendants who represented these real estates were H. O'Callaghan and Maria M'Mahon.

The judgment for £770 was recovered by Foster. Under an assignment of 1786 Terence O'Brien became equitably entitled to it. The other judgment was recovered by T. O'Brien's father, and

on his death, prior to 1806, T. O'Brien became his personal representative and so entitled to it.

In October 1806, two accounts were settled between Murtagh M'Mahon and Terence O'Brien on foot of these judgments. In these accounts O'Brien gave credit to M'Mahon for some payments on foot of the judgments, and a balance was struck ascertaining the sum due on each, which fell very little short of the entire of the penal sums secured by them. These accounts were signed by both O'Brien and M'Mahon.

Terence O'Brien, the plaintiff in the original bill of 1810, died in 1839. In 1808 the judgment for £100 had been revived against Murtagh M'Mahon; but there was no revival of the judgment for £770. The statute relied on as barring it was statute 8 G. 1, c. 4, s. 2, which gives no force to a written acknowledgment, but which excopts from its operation cases where "any interest of money hath been paid, or other satisfaction made on account thereof," within twenty years. The above mentioned accounts were relied upon as evidence, to prove payments within this saving, against the purchasers of the real estates and their representatives, on the ground that the statements of credits in them were admissions against the interest of Terence O'Brien, who stated the account and who was since dead, and that the accounts themselves were admissions against the interest of Murtagh M'Mahon, who was also dead.

Thomas M'Mahon, the son of Murtagh and his co-obligor, died in 1793. The title to the real estates was not deduced through him, but there was certain personal property which had belonged to him (in reference to which questions arose in another part of the case), and the same accounts were relied on as evidence against the persons claiming this personal property.

THIRD—Another ground relied on to meet the bar of the statute of 8 G. 1, in reference to the judgment for £770, was, that an action or suit had been prosecuted within the meaning of that Act, for recovery of the amount of the judgment, less than twenty years

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before the bill of 1810. The proceedings which gave rise to this point were as follows:—

Robert Foster the conuzee of the judgment, which was entered in the King's Bench, by deed of April 1786 assigned it to Terence M'Mahon. No memorial of this assignment was ever enrolled pursuant to the statute 9 G. 2, c. 5. Terence M'Mahon died, and in June 1806 his executors assigned the judgment to Terence O'Brien, the plaintiff in the original cause of 1810. This assignment also was never enrolled.

Terence O'Brien being, under these deeds, only equitably entitled to the judgment, could not revive it. He, however, in June 1807, caused proceedings to outlawry to be taken against Murtagh M'Mahon in the Common Pleas. The writ of proclamation on which this outlawry was founded was tested 12th of February 47 G. 3, and required the appearance of M'Mahon "to answer Terence O'Brien, Esq., assignee of Terence M'Mahon deceased, of a plea that he render to him £772. 4s. 1d. which he owes and unjustly detains, and so forth," and commanded proclamations to be made in the usual form. A return being made to the writ and there being no appearance, an inquisition was obtained in September 1807 from the Sheriff of Clare, finding Murtagh M'Mahon entitled to certain lands (including those which were sought to be affected by the present suit), and on the 12th of February 1808 a grant of those lands in custodiam was made in the Exchequer to Terence O'Brien, describing him as "assignee of Terence M'Mahon, surviving executor of Terence M'Mahon deceased." Soon afterwards the usual order to the tenants to pay the custodee the rents was made.

Contemporaneously with these proceedings, precisely similar proceedings were taken by Terence O'Brien on foot of the judgment for £100, which, as before mentioned, was legally vested in, and had been previously duly revived by, him.

In May 1808, Murtagh M'Mahon died, and thereupon Colonel M'Mahon applied to the Court of Exchequer for liberty to plead the outlaw's death and remove the hands of the Crown, which was granted, and the custodiam proceedings in both cases fell to the ground.

Meantime Terence O'Brien had obtained from the administratrix of Robert Foster, the conuzee of the judgment for £770, an assignment of it, dated in April 1808. A memorial of this assignment was duly enrolled in the King's Bench on the 24th of November 1810; and then for the first time the legal interest in the judgment became vested in Terence O'Brien.

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It was contended for the plaintiff that the custodiam proceedings were sufficient to keep the judgment alive within the statute of *G. 1.* The defendants insisted that, not being taken by a person legally entitled to the judgment, they were wholly void, or at least so irregular that they never could, as they admittedly never did, result in payment; that the statute only referred to proceedings taken by a person entitled to sue, and the representative of Foster being the person so entitled, until after the filing of the bill of 1810, she was barred by the statute; that if there had been no assignment from her enrolled, the judgment would therefore be barred, and the assignment could not set up the judgment again. The construction put on this provision of the statute in *Smith v. Creagh (a)* was also questioned.

FOURTH—Another question arose upon special directions sought by the amended bills in respect of certain funds claimed as personal estate of Murtagh M'Mahon, and on the effect of certain proceedings in the Court of Exchequer. This part of the case turned on the following facts:—

Murtagh M'Mahon's estates had been settled in 1752 and 1760, reserving the ultimate fee to himself. He had two sons Thomas and Charles, and one daughter Margaret, who afterwards married Daniel O'Donoghue. By deed of 1785, Murtagh, in exercise of a power, charged and appointed £3000, £2000 to his daughter Margaret O'Donoghue, and £1000 to his son Charles.

Daniel O'Donoghue assigned £1499, part of his charge of £2000. This portion of the charge passed through various persons; but ultimately in 1793 was assigned to Archdeacon Smyth in trust for Colonel M'Mahon, nephew of Murtagh. Daniel O'Donoghue died in 1800, Margaret his wife having died in 1798. They left a son

(a) Batty, 384.

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Charles, who died in 1806, and his widow Mary O'Donoghue became his personal representative and also personal representative of Daniel, and as such she claimed to be entitled to £501, the balance of the charge of £2000.

In 1790 Charles M'Mahon mortgaged his £1000, to secure £600. The mortgagee's interest in this also afterwards became vested in Smyth as a trustee for Colonel M'Mahon. Charles continued to his death entitled to the balance of £400. Charles M'Mahon died in 1792. Several years after his death, viz., in 1806, shortly before the institution of the Exchequer suit mentioned hereafter, Colonel M'Mahon obtained administration to Charles M'Mahon as in case of an intestacy, and was treated as his personal representative at the institution of that suit. On the death of Colonel M'Mahon, which occurred in 1818, administration *de bonis non* as in case of intestacy to Charles was obtained by Mary O'Donoghue, dated in 1819.

It turned out afterwards that Charles M'Mahon had made a will, bequeathing £1000 to his brother Thomas and making him residuary legatee, his other legacies being very trifling. Thomas M'Mahon the legatee died in 1793, the year after Charles. He died intestate and unmarried, leaving Murtagh his father his sole next-of-kin. His sister Margaret O'Donoghue and her son Charles were also as before mentioned then living.

In February 1807 Smyth, as trustee for Colonel M'Mahon, filed his bill in the Court of Exchequer to raise the two sums of £1499 and £600, portions of the £3000 charge vested in him. There was a decree to account in this cause in 1810, which among other things directed an account of Murtagh's personal estate. In 1811 the Remembrancer made his report and found the sum due to Smyth the plaintiff, and to Mary O'Donoghue representative of Daniel, on foot of the balance of £501, and to Colonel M'Mahon representative of Charles M'Mahon, on foot of the balance of £400; but the Remembrancer in the report further stated that it was admitted before him that the last mentioned sum of £400 belonged to Mary O'Donoghue as executrix of Charles O'Donoghue deceased, who was the nephew and only next-of-kin of Charles M'Mahon; and the

report further found that Murtagh M'Mahon did not die possessed of any personal estate, no evidence having been given thereof.

In June 1811, the cause was heard on the Remembrancer's report, which was confirmed; and interest being added to the principal sums reported due, the decree, after directing payment to the plaintiff Smyth and to Mary O'Donoghue as representative of Daniel and Charles O'Donoghue (on account of the £501), directed payment also to Colonel M'Mahon, administrator of Charles M'Mahon, of £1023, being the amount due on account of the £400; and a sale in default of payment of the sums decreed.

There was no sale in the Exchequer cause; but a receiver was appointed, who brought into Court considerable sums of money. Payments were, from time to time, made under several orders in the cause to the parties mentioned in the decree, including Mary O'Donoghue. No person representing the interest of the plaintiff in the present cause was a party to this Exchequer cause.

Some years after the decree in the Exchequer, viz., in 1816, a citation was issued to prove the will of Charles M'Mahon. The will was contested, but was ultimately established against Mary O'Donoghue, the administratrix; and in 1822 administration with the will of Charles M'Mahon annexed was granted to Maria M'Mahon, who was the widow and representative of Colonel M'Mahon.

By the amended bills filed in the present cause, the foregoing matters were stated: and it was charged that both Maria M'Mahon and Mary O'Donoghue claimed to be entitled to the £1023 in the Exchequer cause, but it was insisted that, inasmuch as on the death of Charles M'Mahon his brother Thomas had become entitled to it under his will, which was afterwards proved, and Thomas had then died intestate, leaving his father Murtagh his sole next-of-kin, this sum thus became personal estate of Murtagh, and was available as such for payment of the plaintiff's demand. Mary O'Donoghue answered the first amended bill on the 10th of April 1826.

Murtagh M'Mahon died in 1808; and Mary O'Donoghue obtained letters of administration to him.

Another bill was afterwards filed in the Exchequer by Jane

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O'Brien, and the receiver was extended to her cause. By a decree in it, made in 1835, a sum of £1316 was decreed to be due to Mary O'Donoghue. This sum was principally composed of the £1023 decreed in *Smyth v. M'Mahon*. The bill on which the present cause was now heard was filed in 1834, and amended in 1843. By Sir E. Sugden's decree it was declared that Foster, the plaintiff, was entitled to be paid the amount of his judgments out of the sum remaining due on foot of the demands of Mary O'Donoghue under the two Exchequer decrees in *Smyth v. M'Mahon*, and *O'Brien v. M'Mahon*; and that the consolidated sum of £1023 and what had accrued due on foot thereof or of the sum of £400, and was not paid out to Mary O'Donoghue prior to the 10th of April 1826, were part of the personal estate of Murtagh M'Mahon; and it was referred to the Master to take an account of how much of the fund in the Exchequer remained due in respect of the £1023 or £400, and to report what payments, if any, were made out of it since 1826.

Maria M'Mahon presented a petition of rehearing, stating that Murtagh M'Mahon only became entitled to the sum in dispute as next-of-kin of Thomas his son; that she was personal representative of Charles, and also of Thomas, and was also a creditor of Thomas; and that there were considerable sums due to her for the testamentary expenses of both, as well as on account of the debt of Thomas, which she would be entitled to be paid before the claims of Murtagh or any of his creditors; and insisted that the decree should declare the plaintiff entitled to be paid only out of so much of the sum in the Exchequer as would be found to be personal estate of Murtagh, and that, to ascertain this last, an account should be taken of the personal estates of Charles and Thomas, their debts, &c., and of the legacies of Charles.

The representative of Mary O'Donoghue (she having since died) also presented a petition of rehearing on this part of the case. He relied on a deed of 1792, by which Murtagh M'Mahon conveyed real estates to Colonel M'Mahon and the latter undertook to exonerate Murtagh from his debts; and it was insisted that, as under it Mary O'Donoghue, if entitled to the sum in dispute, would have a right to

compel Colonel M'Mahon to exonerate it, being the personal estate of Murtagh, and as that right was now lost, by the plaintiff's delay, the direction respecting this fund in the decree should not have been made; and also that, inasmuch as the estates conveyed to Colonel M'Mahon, and out of which he was bound to exonerate Murtagh from his debts were the real estates sought to be attached in this suit, they were bound to exonerate Murtagh's personalty, and therefore also the direction was erroneous. In Sir E. Sugden's decree, dismissing the bill against the real estate, liberty was given to Mrs. O'Donoghue to file a bill, if advised, against M. M'Mahon.

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In the argument of the branch of the case relating to this fund in the Exchequer, it was contended that the plaintiff could not have relief against it, as a creditor of Thomas, the joint obligee in the bond for £770, and thus overreach Maria M'Mahon's claim as Thomas's creditor, inasmuch as the plaintiff's demand against Thomas was barred by lapse of time.

FIFTH—Terence O'Brien, the plaintiff in the original cause of 1810, died about the year 1829. Several other parties to the suit died in the same year. Administration to Terence O'Brien was obtained by Grace O'Brien; but no steps were taken by her in the cause. She died before 1834. In December in that year the present plaintiff Foster obtained administration *de bonis non* to Terence O'Brien. He filed a bill of revivor and supplement on the 6th of July 1836; which was afterwards amended in 1843, and was the bill on which the cause was now heard.

The usual order to revive was obtained in March 1841; and another order to revive (after the amendments) was obtained in 1844.

It was now objected that more than six years having elapsed between the death which abated the suit and 1836, the cause could not be revived: that therefore the present bill was to be treated as an original proceeding unconnected with the suit pending since 1810, and thus the plaintiff's claim was plainly barred by the Statute of Limitations.

SIXTH—It was contended for the defendants that the original bill having been filed in 1810, on foot of judgments then more than

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thirty years old, there had been such monstrous and unreasonable delay, and the rights of parties had been so altered in the meantime, that no relief should be given, even if the plaintiff was not absolutely barred.

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SEVENTH—It was argued in reference to the relief sought against the fund in the Exchequer, that any sums paid out in that Court could not be brought back; and that it would be unjust to Mrs. O'Donoghue and her representative, who acted on the faith of the decrees and orders of that Court, to make them refund after such a lapse of time. The circumstances under which the payments were made, and on which this topic arose, have been already stated.

Argument.

The *Solicitor-General* (Mr. Monahan), Mr. *O'Brien* and Mr. *Mullens*, for the plaintiff.

Serjeant *Warren* and Mr. *Maley*, for Maria M'Mahon.

The *Attorney-General*, Mr. *Rogers* and Mr. *Lysaght*, for other persons interested in the real estates.

Mr. *Christian*, for Mrs. O'Donoghue.

The topics relied on and the authorities are fully referred to in the judgment. The cause stood for consideration.

Jan. 25.

THE LORD CHANCELLOR.

Judgment.

A great variety of questions have been argued in this cause, and I have endeavoured to extricate the case from the complexity in which it is involved, but I find there are some topics which must be still further discussed.

*First point—
 Elegit not necessary.*

As regards the first question that arises in the case, viz.—the liability of the real estate under this suit; it was very much argued on the judgment of my learned predecessor, Sir Edward Sugden. I differ from Sir Edward Sugden in the view which he took in reference to one point, viz., that it was necessary before the filing of the

bill of 1810 to have sued out an *elegit*. The authority on which his view of that point was stated to have been founded is the case of *Neate v. The Duke of Marlborough* (a). That case must now be considered a ruling authority on the subject to which it refers. The proposition decided in it may formerly have been open to some question. I need not, however, consider what weight is to be attached to all that has been said of the case of *Townsend v. Askew* (b), or whether Lord Cottenham would have come to the conclusion he did come to if there was a reported decision of Lord Eldon in the way. From the report in the *Law Journal* (c) it would appear that the note read from the brief of Counsel, of *Townsend v. Askew* in the argument of *Neate v. The Duke of Marlborough* was incorrect, and that Lord Eldon and Lord Redesdale both came to the conclusion that the position in the old authorities only applied to chattels, and rested on this principle, that, until execution, a chattel was not bound at all. It is not easy to see why the doctrine was applied to realty. The *elegit* no more binds the estate than the judgment itself did. Until inquisition the *elegit* makes no difference in that respect; and therefore there seems no reason for giving any greater effect to the *elegit* than the judgment itself had. Still, however, the principle must be considered as now established. But Lord Cottenham, in deciding that very case, excepts from its principle those cases where the Court recognises a title in the judgment creditor independent of the *elegit*. "It is true," he says (d) "that, for certain purposes, the Court recognises a title by the judgment, as for the purpose of redeeming, or, after the death of the debtor, of having his assets administered. But the jurisdiction there is grounded simply on this, that, inasmuch as the creditor is in a condition to acquire a power over the estate by suing out the writ, it does what it does in all similar cases—it gives to the party the right to come in and redeem all other incumbrancers on the property. So, again, after the debtor is dead, if under any circumstances the estate is to be sold, the Court pays off the judgment creditor because

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(a) 3 My. & Cr. 407.

(b) Cited from MS. 3 Myl. & Cr. 410, 412, 418.

(c) 3 Law Jour. 200, nom. *Townsend v. Agnew*.

(d) 3 M. & Cr. p. 416.

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it cannot otherwise make a title to the estate, and the Court never sells the interest of a debtor subject to an *elegit* creditor."

The instances so put do not appear as strong as they really are, at least according to the practice in this country. In *Barnewall v. Barnewall* (a), where the same objection (for not having sued out an *elegit*) was made, it is stated by Lord Clare to have been the settled practice, for more than a century, to entertain bills in the first instance, after the death of conuzor, for an account of his real and personal estate, and the sum due on foot of the judgment; because this course tends to expedite payment of the debt, to preserve the estate from accumulated costs, and to save a multiplicity of suits. That therefore goes beyond Lord Cottenham's principle. The bill is filed not on the ground of the want of an adequate remedy elsewhere, nor is it necessary to show a difficulty in any case; for though the debtor died actually seised, the Court will proceed to sell without merely acting in aid of a Court of Law, but exercising an original jurisdiction; and the creditor gains that which he could not have under an *elegit*, viz., a sale of the entire estate. Therefore such a suit is within the principle of the exceptions stated by Lord Cottenham; and as regards the lands conveyed away by the conuzor before his death, but of which he was seised at the rendition of the judgment, the object of the suit is to have those lands considered, so far at least as regards the judgment creditor, as being assets of the deceased debtor.

I observe also that no objection on this ground was taken in any of the answers, and the bill is not demurred to as it was in *Neate v. Duke of Marlborough*. The point is only raised in the last resort. Therefore, beside the circumstance that the case is, on principle, different from *Neate v. Duke of Marlborough*, the point is here not raised by the answers; and I think therefore that the suit is maintainable as against the real estate.

Then comes the question on the facts of this case, has the plaintiff still a remedy against that estate? Nothing, it is urged, has occurred to keep the judgments alive as against the real estate. The judg-

(a) 3 Ridgw. 24, see pp. 62, 63.

ments are of 1776, and the bill was not filed till 1810. *Prima facie* they were completely barred by the operation of the statute of G. 1 (a), which was the Act then in force. It is said however that on certain grounds two of the judgments were saved from the operation of that statute. One of them, for a small sum, was revived against the conuzor in his lifetime, and that therefore stands on grounds free from difficulty; the other, which is for a large sum, is said to be saved for two reasons.

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The first is, that in 1806 an account was settled between the conuzor Murtagh M'Mahon, who was then alive, and the creditor, and on taking that account, they ascertained the sum due (the conuzor taking certain credits as for payments previously made on account) and struck a balance; that that is a good answer to the statute as against the party himself, and so, through him, is good evidence against the defendant. But that transaction took place many years—very nearly twenty years—after the conveyance of the estate; for in 1792, or 1793, the estates had been conveyed away by Murtagh M'Mahon, and the purchaser was no party to it.

*Second point—
 Account not
 evidence.*

It is said however that this account can be read on behalf of the plaintiff against the purchaser, because it contained an admission against the interest of the party making it. I was surprised when I heard the principle pushed to such an extent. The general doctrine is clear, that the admission of one person is no evidence against another not claiming under him. The exceptions to the rule are few. They have been much discussed, and there are several authorities showing what they are; but none of them go nearly the extent here contended for, *i. e.*, that in all cases the admission of a balance due in the settlement of an account between two parties is, after the death of the party making the admission, evidence against all the world. The principal exceptions to the general rule exist in the special cases of persons in occupation of lands making admissions respecting that occupation against their interest, and of persons who in the course of their duty or business, as receivers or bailiffs, make entries, charging themselves with the receipt of money on account of their

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employers, or who make entries in the regular course of professional business.

The case in which an exception to the rule was carried furthest is *Ivat v. Finch* (a). There, upon an issue between third persons as to whether a horse belonged to A B at the time of her death, a declaration by A B that she had given up her farm and stock to one of them (the plaintiff) was held to be admissible for the plaintiff, to prove that the horse belonged to him before A B's death. That is a very broad proposition. But the defendant there justified under a heriot custom; and I observe in a note (b) to *Starkie's Evidence*, the editor says this:—"Note that in this case the defendant claimed through A B, upon whose death he became entitled to a particular portion of his personal property as a heriot." That shows there was a privity between the defendant and A B, and explains the case. It was an action brought by the plaintiff against the lord of the manor who claimed the chattels as a heriot, deriving through the deceased person whose declaration was offered in evidence, and whose the chattels were admitted once to have been. The case may well be supported on that ground.

There were three other cases in *Carrington & Kirwan's Reports*, cited. The first, *Roberts v. Justice* (c), was a case where an action of trover was brought by the purchaser of furniture at an auction of a person named Botwood, against the Sheriff, who had after the sale seized them under a *fi. fa.* against Botwood. It was proposed, for the defendant, to ask, whether at the time of the Sheriff's seizure Botwood did not say that the goods were his son's. That was apparently within the alleged principle of being against his interest; and *Ivat v. Finch* was cited. Wightman, J., says:—"I think the evidence is not admissible. In the case referred to the parties claimed under the persons whose declarations were given in evidence. In this case the plaintiff claims adversely to Botwood." In another case in the same book, *Prosser v. Gwillim* (d), the same doctrine is laid down, that the circumstance of a declaration being

(a) 1 Taunt. 141.

(b) 1 Stark. 357, note (b); and see 1 Phil. Ev. 301, n.

(c) 1 Car. & Kir. 93.

(d) 1 Car. & Kir. 95.

against interest will not make the declaration evidence unless as against a party claiming through the person making the declaration. So in *Stothert v. James* (a), in the same book, it was held that, on the trial of an issue directed to try whether goods seized under a *fi. fa.* sued out against A, at the suit of the defendant, were the goods of the plaintiff, the declarations of A, as to the property in the goods, were not receivable in evidence for the plaintiff. Therefore I do not look on *Ivat v. Finch* (b) as warranting the proposition that in all cases declarations against the interest of parties are evidence against all the world.

As regards the admissibility of this account, considering the time when it was settled, I may refer to the case of *Doe d. Sweetland v. Webber* (c), in which declarations against the interest of the declarant were rejected when offered in evidence against a person to whom he had previously conveyed his estate. The argument sought to be deduced from the declarations there was, that the admission of the debt which was the consideration for the defendant's deed (by establishing which, as a deed for value, the prior conveyance to the plaintiff was sought to be avoided) was as much evidence as the execution of the deed itself; but it was held that the party having conveyed away his estate could not affect his assignee by a declaration after the conveyance; and Lord Denman there says (d):—"The act of executing the conveyance is evidence; but declarations made by the party after having (as far as appears in proof) passed away his interest by the settlement stand on a very different ground." It was tried there to make the declarations evidence as part of the *res gesta*, but it was not allowed. There is another case, *Elverd v. Foster* (e), where the schedule of an insolvent was held not to be evidence against his assignees, because, after the vesting order, all the insolvent's interest had passed away from him. That is on the same principle.

On general principles, therefore, I could not lay it down that these

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(a) 1 Car. & Kir. 121.

(b) *Ubi supra.*

(c) 1 Ad. & El. 733.

(d) p. 739.

(e) 9 Dowl. 922.

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accounts are evidence against a person who acquired his title previously to their being stated. But as to the documents themselves, the statements, so far as regards Murtagh M'Mahon, are rather in favour of the person making them than against him. He was bound by the judgment against himself. He had got a contract from Thomas M'Mahon to indemnify him against the judgment; therefore it was his interest to keep alive the judgment as against Thomas M'Mahon if he could; at all events it was his interest to get credit from the owner of the judgment for the payments admitted in the account. Therefore there was at least a balance of interests, and not that clear case of the statement being against his interest which is requisite for the admissibility of this kind of evidence. No Judge could carry the doctrine to the extent to which it was pressed. The admissions of every debtor would, according to the argument, be evidence against all the world. This sort of interest occurs in every case, and the admission in evidence of such statements would lead to the greatest mischiefs.

Therefore, if the case rested on that alone, I would have little difficulty; for I think it quite clear that these accounts are not evidence against the purchaser to whom a conveyance was made before the account was stated. Whether they are evidence against Thomas M'Mahon is another question; for he was bound for the same debt as his father, and, if that is shown, it may be possible to get in the accounts as evidence against him: but I need not consider that until I come to consider what is the position of Thomas.

*Third point—
 Effect of the
 custodiam pro-
 ceedings.*

There are, then, other matters relied on as to the real estates—viz., the custodiam proceedings. It appears clearly that in the year 1808 proceedings were taken to enforce this very judgment debt; and the creditor would, if it was not for the death of the outlaw, have then procured payment. The estates were actually seized, and an order made to pay the rents as against all the tenants. Whether any payment was then made does not appear. These proceedings would, no doubt, as the law then stood, keep the judgment alive against the conuzor. The question is, whether they have the same effect against the prior purchaser? On that point I am not satisfied and I will require the case to be further argued.

The statute (a) gives a particular bar by plea of payment ; but it is, in terms not expressed very clearly, given under restrictions, one of which is, "unless the plaintiff or plaintiffs in such action or suit, or those under whom he or they claim, hath or have commenced or prosecuted some action or suit for the recovery of such debt or duty" within the space of twenty years. That is not confined to the particular proceeding in which the defence is pleaded : it leaves it open to the creditor to say to the debtor, "I made a demand by suit within twenty years, and that is sufficient to prevent your having the benefit of the statutable bar." In *Smith v. Creagh* (b) that construction was adopted, though the proceeding there was not properly a suit to recover the debt. The Act does not say to what length in the suit the creditor must go ; it is not that he must go to trial or any other particular stage, but it merely requires that there should have been *some* action or suit. The previous part of the Act may throw some light on that by the manner in which it speaks of debts on which no "demand" has been made, and it may have been intended that that *demand* should be made by *suit*, and that making a demand by suit should be sufficient, as far as the bar of the statute was concerned, to keep the debt alive. Whether there is any presumption of payment or not, is another question, and does not arise here ; for the question turns only on the statute and its construction. I wish therefore to have this part of the case argued again on the effect of these custodiam proceedings. It was only relied on at the close of the reply, and was not fully discussed (c).

As to the personal estate of Murtagh M'Mahon, the decree has got over many stages which *prima facie* would require proof. The money which is sought to be attached as the personalty of Murtagh M'Mahon never was tangible as such ; it was the personal estate of his son Charles, and, on his death, of Thomas ; and it was through Thomas only that it became personal estate of Murtagh. It would be a strong measure to hold it was affected as being the personal estate of Murtagh, whose it never actually was, without being first carried through the intermediate persons. It is admitted that it

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*Fourth point—
As to the funds
in the Esche-
quer cause.*

(a) 8 G. 1, c. 4, s. 2.

(b) Batty, 384.

(c) See *post*, pp. 309, *et seq.*

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was at first the personal estate of Charles. I find in the Exchequer decree that this money is reported to be the property of Colonel Thomas M'Mahon. The report finds the amount to be *due* to the defendant *Thomas*; and it goes on to say, not as a conclusion of the officer but an admission of the parties, no doubt against the truth of the facts, that it belongs to Mrs. O'Donoghue as next-of-kin to the deceased Charles. In that right she clearly could not claim the money. She was not next-of-kin to him, for his father was. Therefore there is a manifest error in the decree on that subject. It is found that there was no personal estate of Murtagh. This money is not awarded to be paid to Mrs. O'Donoghue, but is awarded to Thomas M'Mahon. Therefore there is as yet no decree directing the payment of this money to Mrs. O'Donoghue. It directs the payment to Thomas as the administrator of Charles, and not to her. It is not explained how she came to get any money in the cause. An order was made for that, but it is not so in the decree; and there the money remains under the decree to this hour. One or two matters occurred to me since the hearing of the cause, and this is among them—that there is no declaration that this money should be paid to Mrs. O'Donoghue.

It is said, however, that by the Exchequer proceedings the money became so bound as against Thomas and the representative of Charles that it cannot be recalled. It is, however, also to be taken as against her that this money was personal estate of Murtagh M'Mahon, and it was not given to her. It is impossible to say that the proceedings in the Exchequer will bind a creditor of Murtagh. There was a great miscarriage in finding that there was no personal estate of Murtagh, where the facts clearly show that there was. I cannot discover why there was in that suit a decree to take an account of the personal estate of Murtagh. There is nothing to prevent a creditor of Murtagh from claiming this. It is clear enough that in the result it becomes personal estate of Murtagh. As it stands in the Exchequer decree it was the estate of Charles; but his representative is said to have held it in trust for Mrs. O'Donoghue. He in fact bequeathed the money to Thomas. Administration with the will annexed was afterwards granted to Mrs. M'Mahon. The

consequence of that was, that the prior administration was avoided. *Kelly v. The Bank of Ireland* (a) shows that an administration as in case of intestacy becomes void when a will is afterwards found. In that case there were executors appointed by the will, and perhaps that may make a distinction. But however that may be, here the persons who sought for the money in the Court of Exchequer by the bill of 1817 made no title under the first administration. That bill appears to have been founded on the new administration to Charles. The bill was ultimately dismissed, but not on the merits. Thus the case has become as complicated as a case can well be. What remains is, I think, the money of Murtagh; but the question is, can I get at it in this suit, passing over all the intermediate estates? It may be, so far as the administrator of Charles is concerned, he is bound as much as the first administrator.

Now, in the petition for re-hearing, Mrs. M'Mahon says that she is the legal personal representative of Charles and Thomas, and that she is also a creditor of Thomas, and that the decree ought to contain a declaration that the plaintiff is entitled to be paid out of so much of the sum in the Exchequer as shall be found to be part of Murtagh's personal estate, to be ascertained by taking accounts of the personal estates of Thomas and Charles. She wishes that the decree should declare that there should be an account of the personal estate of Thomas, and that she would come in as a creditor of his, and so attach the personalty in that character. The difficulty is, that the decree passes over all the stages by which the money became the money of Murtagh, which should be first proved. It may be bound continuously as against Charles' representative by the Exchequer proceedings. I do not see how I can relieve his administrator from the admissions in the cause, and I must take the administrator as acknowledging that there is no debt of Charles' to be discharged; that his personal estate is wound up, and the Exchequer proceedings disposed finally of this money, though they make a wrong disposition of it no doubt. Therefore it cannot be any longer regarded as the money of Charles.

The next question is as to Thomas M'Mahon the younger. As

(a) Batty, 593.

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to him the persons disputing the claim are not the administrator of Thomas, but Mrs. O'Donoghue and others, including Mrs. M'Mahon, who say they have a charge on the estate of Thomas. In the Exchequer there was no decision on this point. The decree relied on as giving the money to Mrs. O'Donoghue was made in the absence of Thomas' representative. I do not see how he could now be refused relief; for he is not bound by those Exchequer proceedings at all. No account was taken as to this judgment in the Exchequer. But if the plaintiff is not entitled as against the assets of Thomas, I have nothing about that before me; I have nothing to do with it, except that I cannot get at this money as assets of Murtagh without taking the account of Thomas' assets. The plaintiff however relies on the judgments as being obtained against Murtagh and Thomas, father and son, for the same debts. The judgments and bonds are of the same date. That is some proof that one was against a surety, and that both were for one and the same sum. But as against Thomas there is nothing to keep the judgment alive; therefore against him it stands in the same condition as against the real estate; and as to that, the question again arises on the accounts and custodiam proceedings. I will therefore reserve my opinion as to the effect of the judgment against Thomas until the case is re-argued.

Fifth point.
Revivor regular.

There are two other objections then made. The first is, that the bill of revivor itself was late, because it was not filed till six years had elapsed after the death of the person whose death abated the suit. Whether it was or was not filed within that time is not clear; but the answer to the objection is, that the cause has been already revived. There was no plea of the Statute of Limitations, and it is too late now at the hearing to object where the cause has been actually revived. But I have looked into the question, and I think there are strong grounds for holding that there is no rule existing which prevents the reviving of a suit after six years.

Lord Redesdale's proposition on this subject (a) is founded on the case in *Peere Williams, Hollingshead's case* (b). The proposi-

(a) Mitf. Eq. Pl. 272.

(b) P. Wms. 742.

tion there stated in the abstract is clearly enough laid down, that the suit must be revived within six years, unless there was a decree before the abatement. But there is a late case, *Perry v. Jenkins* (a), showing that that doctrine has not been followed. That was a suit for an account of rents, and had become abated after answer and before decree by the plaintiff's death; and a plea of the Statute of Limitations, put in by the personal representative of the defendant (who had also died), to a bill of revivor by the plaintiff's representative, was overruled, because it did not aver that six years had elapsed since representation had been taken out to the original plaintiff. That was decided on the authority of *Murray v. East India Company* (b). The case I refer to does not apply directly to this point; but it was stated by the Counsel in argument, that the proposition from the case in *Peere Williams* had not been followed, and the Master of the Rolls says:—"The plea sets out the words of the statute, which are to the effect that the action must be commenced and sued within the six years. In this case the suit was commenced and sued, not by filing the bill of revivor and supplement, but in the year 1818, when the original bill was put upon the file. The bill of revivor is not a new suit, the terms of the order of revivor being that the suit shall be in the same plight and condition as it was at the time of the abatement. Although certainly in *Hollingshead's case*, which was cited in support of the proposition raised by the present plea, it was said by the Court, but not decided, that the statute does apply to such a case." The case was decided on another ground, but this is enough to show that whenever the point comes to be argued there will be a question about it.

Then it is objected that the fund cannot be followed, and it is said that there has been such delay that the party ought not to have the benefit of this suit. Mere delay in a suit will not deprive a party of rights which were in existence when the suit was instituted. In the case of *Moore v. Blake* (c), which went to the

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Sixth point.
Delay.

(a) 1 My. & Cr. 118.

(b) 5 B. & Al. 204.

(c) 4 Dow. 230, see p.p. 242-3.

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House of Lords, Lord Eldon says:—"Then we are to consider whether there is any thing to bar the relief upon the authority of these cases, not of the cases which justify a dismissal on the ground of not commencing a suit in due time, but of those cases which justify a dismissal on the ground that, though begun in due time, it has not been prosecuted with due diligence, and I do not think the present case falls within that principle. The equity of redemption was never foreclosed, and they might at any period have moved to dismiss the bill. I cannot therefore understand the ground upon which the not prosecuting the suit with due diligence has been in this case considered as a bar to the relief. There never was any motion to dismiss the bill for want of prosecution, and the case does not appear to fall within the principle upon which the length of time is a bar." Lord Redesdale says the same thing. Therefore that objection is not tenable. The suit here was commenced in 1810; there were abatements and delays; but the right was then asserted, and the money stays where it was then, and there is nothing in the delay to deprive the plaintiff of his rights.

Seventh point.
Protection of
former pro-
ceedings.

It is then urged that the plaintiff is seeking to overturn what has been done in another Court, and that that would be unjust to those who have acted under the supposition that what was done was right. That would be of force if the plaintiff was going personally against the representative of Charles M'Mahon, for if you allow a trustee or executor to act under a decree of a competent Court you cannot make him responsible for what he has done under that decree. But it is a different thing as against a party who gets money which was not his or hers, and who remains still liable if he takes it.

In *Kettleby v. Lamb* (a) a bill had been filed to have money in the hands of trustees laid out for the benefit of the plaintiff. The bill was dismissed, and the trustees paid the money to the person declared entitled to it. This decree on a bill of review was reversed, and though it was held that, as the trustees had relied on the dismissal of the former bill for their indemnity, they were indem-

(a) 2 Ch. Rep. 404.

nified by it, yet the suit went on against the other parties, and the plaintiff was left to seek the money against the persons to whom the trustees had paid it. The principle acted on in *O'Brien v. Grier-son* (a) and *Farrell v. Smith* (b) was the same. Now here the plaintiff seeks no rights against trustees. Whatever was done under the decree in the Exchequer is as to them to continue unaltered. He seeks relief against the party only to whose hands the money would come. Therefore I do not see any thing in this objection to prevent relief being given here. This being the common case of two people claiming money respectively to belong to them, each must under the circumstances be responsible for it just as if a suit was instituted for it the day after either of them got it.

The only persons that this would press hardly on are those representing Mrs. O'Donoghue: and as to them some further directions might be necessary. But it is a question whether it would be worth while to take an account against her personal representatives. The injunction order does not vary the case or prevent the money being recovered against her.

[An account against her representative to recover the money she had received was not pressed for.]

On the whole case, I think therefore the bill cannot be dismissed on the ground that an elegit was not sued out; nor is the plaintiff prevented from recovering by the other matters to which I have referred, except it may be by the Statute of Limitations. On that point and the effect of the custodiam proceedings, let the case be re-argued.

The case was re-argued on this point by—

Serjeant *O'Brien*, Mr. *Fitzgibbon* and Mr. *Mullens*, for the plaintiff.

Serjeant *Warren* and Mr. *Maley*, contra.

The LORD CHANCELLOR, at the close of the argument, observed that this difficulty pressed him:—The proceeding to avoid the bar of

(a) 2 B. & Bea. 328.

(b) 2 B. & Bea. 337.

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the statute should be taken by the claimant or some person through whom he claims. If the representative of T. Foster were suing, this proceeding would not be enough to keep the claim alive; the plaintiff could only derive through the legal title of that representative; and the argument must therefore be pressed to this, that though his representative, if suing at law, would be barred, yet the claim was kept alive for the equitable owners in this Court.

The case stood for judgment on this point.

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I allowed this case to stand over to have the point raised on the Statute of Limitations discussed, as far as relates to the effect of the custodiam proceedings. I have considered the case minutely, and I think the custodiam proceedings have the effect of keeping the demand alive under the statute of G. 1. They were manifestly proceedings for recovering the debt due on the judgment, and were submitted to by the then inheritor of the estates. They were proceedings for the purpose of procuring payment, whether they were effectual or not against him. He had accounted with O'Brien. He was equitable assignee of the judgment. If the case had gone to trial, or a motion had been made to traverse the inquisition it might be otherwise; but the claim was not disputed, and all the lands were under custodiam. Instead of opposing them the proceedings were acquiesced in.

Therefore I think the case is within the principle of *Smith v. Creagh* (a); for it was a proceeding by which, if it had been followed up, the debt would have been recovered. There was much discussion in that case as to pleading payment. It was said that that statute affords a conclusive presumption of payment, and that a demand merely will not rebut that presumption, but it must be such a demand in a Court of Justice as would properly result in payment. In *Smith v. Creagh* the proceeding relied on was not such a demand as should necessarily result in payment; and the observations of the

(a) Batty, 384.

Chief Justice in that case show that it is not necessary that the proceeding should be one which would of necessity result in enforcing the debt. The *scire facias* is however such a proceeding, and I think it is a proceeding within the statute, though taken by a person having only an equitable interest in the judgment; that is a complete title to the judgment, wanting only the formality of the enrolment of a memorial. On these grounds therefore I think that the debt was alive at the time of filing the bill in 1810, and I cannot dismiss the bill.

I have already said I would not yield to the objection founded on the want of having sued out an elegit; first, on the ground that it is not made in the answer; but also on this ground, that the suit is a suit to administer assets, and one to which such an objection is not applicable. Therefore there must be a decree as to the real estate.

As to the personal estate of Murtagh:—It came by transmission from Charles M'Mahon. Mrs. M'Mahon claims as his personal representative some rights against that; and the bill prays an account of the personal estate of Charles, which must be decreed. Mrs. O'Donoghue claims to have relief against the real estate, and as far as I can give her that right in this cause I would be disposed to do so. That is left open in the former decree for a separate bill between the two parties, that decree having dismissed the bill against the real estate; but if my view be correct, the equity between Mrs. O'Donoghue and the persons claiming against the personalty may now be administered in this cause.

The decree declared that the former decree should be reversed, so far as it dismissed the bill against the real estate, &c.; and it was referred to the Master to take an account of the sum due on foot of the judgments, and accounts of the real and personal estate of Murtagh M'Mahon in the usual form, and also to take an account of the personal estate of Thomas M'Mahon: and it appearing to the Court that part of his personal estate consisted of the personal estate of Charles his brother, it was also referred to take an account of

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Charles's personal estate, and ascertain the residue thereof, and who became entitled thereto, and what portion of it formed part of the personal estate of Thomas or Murtagh; and it was declared that the sum of £1021 and the sums arising on foot of the £400 in the Exchequer were the personal estate of Charles; and it was referred to inquire what sums were received on foot of these sums by Mary O'Donoghue; but it was declared that her personal estate was not liable to repay what was received prior to April 1826. And as between the parties representing Mrs. O'Donoghue and Maria M'Mahon and those interested in the real estates, the question was reserved whether, under the deed of 1792, the lands thereby conveyed were liable to exonerate the personal estate of Murtagh from the plaintiff's judgments; but this to be without prejudice to the rights of the plaintiff or other creditors of Murtagh.

Reg. Lib. 97, fol. 47, 1847.

CHUTE *v.* M'GILLICUDDY.

May 5, 6, 14.

In a renewal suit against the defendant, tenant for life, and his eldest son, the question was, whether the denomination X was included in the lease or was part of an adjoining farm held by the plaintiff for a determinable interest. A decree was made for a renewal, and referring it to the Master to inquire and ascertain the boundaries. The interest in the farm having afterwards expired, the defendant brought an ejectment for X, which the plaintiff defended and obtained a verdict. Defendant's son having died, and his second son, a minor, become tenant in tail, a new bill was filed against the defendant and this son, which stated the ejectment, and that the question tried in it was identical with that involved in the reference; but the decree made in 1844, which accorded with the prayer, only directed the former decree to be carried out between the parties. In 1845, the son being of age barred the entail, and conveyed the fee to the defendant. A bill was then filed relying on the ejectment, and praying a declaration that it was unnecessary to carry on the reference, and that the former decrees might be in other respects carried out. *Held*, that such relief was a variation of the decree of 1844, which could not be given without re-hearing the cause; and *Semble*, this was a bill of review, which should not have been filed without leave of the Court.

in Arthur Blennerhasset, to whom renewals were granted in 1771 and 1781. Arthur Blennerhasset also held the lands of Cloughnagreany under M'Gillicuddy by an accepted proposal executed in 1770 for three lives. These lands adjoined those demised by the lease of 1703.

Some lives in the last renewal having dropped, Blennerhasset filed his bill for renewal in 1832 against Richard M'Gillicuddy, who was tenant for life, and some other parties whom the state of the title made necessary. In his answer in this suit Richard M'Gillicuddy stated that Blennerhasset had confounded the boundaries of Cloughnagreany and the lands demised in 1703, and insisted that a certain disputed portion of land was not included in the lease. The cause was heard in May 1839, and a decree made declaring the plaintiff entitled to a renewal; and referring it to the Master to inquire whether any, and what, part of the lands now called Cloughnagreany were included in the lease of 1703, and whether any alteration had been made in the boundaries and, if so, when and by whom; and that the Master should settle a proper renewal ascertaining the boundaries, with a map describing them.

Soon afterwards Blennerhasset died, and the present plaintiff became his personal representative. He filed a bill of revivor and supplement, by which he brought before the Court Francis M'Gillicuddy, a minor, the son of Richard and tenant in tail in remainder.

In 1840 the last life in the accepted proposal of Cloughnagreany dropped, and in April 1840 Richard M'Gillicuddy brought an ejectment to recover the disputed denomination of land. The plaintiff took defence for the premises included in the lease of 1703. The case was twice tried at the Tralee Assizes, and two verdicts were found for the plaintiff, thus establishing that the disputed portion was comprised in the lease of 1703.

Francis M'Gillicuddy died in 1841, whereupon Robert M'Gillicuddy his brother became tenant in tail in remainder. In February 1842 the plaintiff filed a bill of supplement and revivor bringing Robert before the Court. The bill stated the ejectment proceedings, and that the question tried in them was precisely the same involved in the reference under the decree of 1839, and that the boundaries

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were correctly marked in a certain map referred to; but it only prayed to revive the suit and have the same relief against Robert which was prayed by the former bill, and to put in issue the map. This cause was brought to a hearing, and a decree made in June 1844, which merely directed that the decree of 1839 should be carried on and prosecuted between the parties thereto in like manner as was directed between the parties to the original suit, reserving further directions. Some steps were taken in the office under this decree.

In December 1844 Robert M'Gillicuddy attained his age. He joined his father Richard in a disentailing deed, executed in 1845, under which the lands demised in 1703 were vested in Richard in fee-simple.

In April 1846 the plaintiff filed the bill which was now brought to a hearing, against Richard M'Gillicuddy. It stated the former bills and decrees, the ejectment and the identity of the question involved in it and in the reference, and the deed of 1845; and prayed that it might be declared that it had become unnecessary to prosecute the decree of 1839 save as therein prayed, and that it might be carried into execution so far as it directed a renewal and the preparation of a proper deed, ascertaining the boundaries according to the map.

Argument. Mr. Bennett, Mr Lane and Mr. Jeffcott, for the plaintiff.

Sergeant Warren, Mr. Hickson and Mr. De Moleyns, for the defendant.

They argued that the bill was in fact a bill of review and reversal, to alter the former decrees in the suit; that as such it was irregularly filed without leave of the Court, and would have been taken off the file on motion; that the objection was equally open at the hearing; that even if the irregularity was got over, no decree could be made; for all the relief sought was personally against Richard M'Gillicuddy, being to bind him in consequence of the ejectment proceedings, and that could have been given just as well in 1844, under the bill of 1842, which stated precisely the same case;

but the decree of 1844 expressly left open all the same questions referred in the decree of 1839; and that if the relief sought could be had at all it could be only by re-hearing the cause of 1842. They cited *Toulmin v. Copeland* (a); *Hodson v. Ball* (b); *Perry v. Phelps* (c); *Partridge v. Usborne* (d); *Davis v. Bluck* (e); *Blake v. Foster* (f); *Redes. Pl.* p. 108; *Dyneley v. Hartley* (g).

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Mr. Lane, in reply, contended that the bill was a supplemental bill, and regularly filed as such; that any event which gives a new interest to a defendant is a ground for a supplemental bill, and the deed of 1845 gave a new estate to the defendant; that the object of the suit was not to review or reverse the decree of 1844, but to bind the inheritance by the verdict in the ejectment, which could not have been then done, as it was not prayed for and Robert M'Gillicuddy was a minor and no party to the ejectment; that the question incidentally left open to the defendant by it was in respect of his life estate, which was now gone by merger in the fee; that this was a supplemental bill in aid of that decree: *Dormer v. Fortescue* (h); that a bill of review was when a party was aggrieved by a decree, but here the plaintiff admitted the decree was right when made, for the inquiry was then necessary as to some parties, which was now useless; and that a re-hearing would be improper, for the deed of 1845 which alone made a decree without the reference effectual was made since the hearing. He distinguished the cases cited for the defendant and relied on *Redes. Plead.* pp. 77, 93, 101, 108, and the cases there cited upon the office of supplemental bills.

THE LORD CHANCELLOR.

This case comes before the Court under peculiar circumstances, and it is difficult to deal with it. The original bill was filed for a

Judgment.

(a) 1 Hare, 41.

(b) 11 Sim. 466; S. C. on appeal, 1 Phil. 177.

(c) 17 Ves. 177.

(d) 5 Russ. 195.

(e) 6 Beav. 393.

(f) 2 B. & Bea. 457.

(g) 2 Jur. 229.

(h) 3 Atk. 133.

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renewal of the lease of 1703, and the supplemental bill was filed to bring before the Court the eldest son of Richard M'Gillicuddy. A decree was taken for a renewal and a commission to settle boundaries, which were said to be confounded. The allegation in reference to that was, that Chute being the lessee under the article of 1770, had confounded the boundaries of the property held under that and under the lease. The decree directed the Master to settle a map of the premises. While the proceedings were still going on the demise of 1770 altogether expired. It was not renewable. M'Gillicuddy then brought his ejectment to recover the premises held under that demise; and the question arose, what exactly was the property held under it? The denomination about which the dispute arose was part of Cloughnagreany. Both parties agreed as to certain portions admitted to have been included in the expired demise; but they disputed as to that. A new trial was applied for in that action and granted, and the second verdict was the same way as the former one, viz., in favour of the party who was defendant there and is plaintiff here. Therefore there are the verdicts of two juries finding what property passed by that lease, and neither M'Gillicuddy or any other person, as I understand it, disputes that question now.

The first tenant in tail then died, and the property devolved on Robert M'Gillicuddy. The supplemental bill of 1842 brought that new tenant in tail before the Court. That bill was filed with a double aspect. As regarded Robert, it sought to make the proceedings available against him, as in an ordinary supplemental bill. But it also stated all the proceedings in the ejectment, and that with a view of making this case, viz., that the effect of them was to preclude further inquiry as to the boundaries—in fact, to bind him by these ejectment proceedings. That cause was heard before Sir E. Sugden. The decree did not go to the extent I have mentioned, and there are two reasons, it is said, for that. First, it is said that that relief was not prayed by that supplemental bill; and the fact is so; there is no such express prayer in the bill. The second reason given is, that the tenant in tail was a minor and not a party in the ejectment, and therefore could not be bound by the proceedings in it. The plaintiff might then have taken no decree at all as

to Robert, and filed a new bill against all the parties, and changed the prayer to one expressly seeking to bind Robert by the proceedings. It would be a fair question, whether it would be for the benefit of the minor to acquiesce in those proceedings? That however was not done; but the plaintiff took a decree as regarded both the minor and the elder M'Gillicuddy himself; and that was to carry on both the proceedings of 1839 and the others, allowing that he was entitled to claim the reservations in the decree of 1839.

So matters stood until 1844. After that Robert attained his full age, and he has conveyed his interest to his father, and the latter has now the entire estate, his life estate being merged in the fee. This bill then is filed, stating that by reason of the circumstances it has become unnecessary to prosecute the inquiry, and praying that the defendant may be bound by the ejectment proceedings. It is difficult to know how to deal with that. It might have been proper to file the bill of 1842 for the full relief sought here; but the decree of 1844 now stands in the way, and I cannot see how I can get over that. It decrees all the same relief as the former decree; all the parties are now just the same as then, and while that stands on the record I cannot see how I can vary it in this cause.

It is said that the bill would have been taken off the file. Certainly, if a motion was made to dismiss the bill I do not see how it could be resisted. If the bill is to be heard by itself, its object is to review the decree of 1844. I can understand it as seeking new relief, and also to vary a part of that decree. That is what the suit really is for, and not to carry on that decree. The office of a supplemental bill is well stated in *Lord Redesdale's Treatise* (a). The objects of a supplemental bill are there enumerated, being in various ways to carry out a former suit. That is not the object of this bill; but it is to deprive M'Gillicuddy of the rights before given. *Davis v. Bluck* (b) more nearly resembles this case, and is an authority that this bill cannot be upheld or the relief sought by it be given, except by doing what was there suggested, viz., re-hearing the former cause. The Master of the Rolls there

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(a) Mit. Pl. p. 77, 5th ed.; p. 63 of former ed.

(b) 6 Beav. 393.

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said :—"I think that a supplemental bill thus brought to, supply a defect in the pleadings and decree in the original cause, and the decree upon which is to be obtained on a re-hearing of the decree in the original cause, is a supplemental bill in the nature of a bill of review, which ought not to be filed without the leave of the Court."

In the case before me now, if the plaintiff thinks he can carry the relief sought, it must be by re-hearing the former decree, and I will let the cause stand over to allow a petition for re-hearing to be presented. It will then be to be considered whether, having regard to that decree of 1844, the relief now sought can be given after that decree has been taken and after such an acquiescence. The case would be subject to much difficulty; but the plaintiff may try it.

[A re-hearing was declined.]

Then the question arises, what am I to do with the cause as it stands. No motion has been made to take the bill off the file as irregular. It states some supplemental matter, viz., the conveyance by Robert. It is said for the defendant that all the same advantage could have been obtained by entering a rule to proceed, the right surviving (a); but that could not have been done, for nothing appears on the record to show that there was a right which would survive. So far therefore as regards that portion of the case, I think the bill is properly a supplemental bill. It prays general relief, and I think the plaintiff may have the ordinary relief, viz., the benefit of the former decree. I will give him that relief and dismiss the rest of the suit with costs.

Reg. Lib. 97, fol. 48, 1847.

(a) See Side-bar Rule.

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LADY LANGFORD v. MAHONY.

May 29.
 June 8, 5, 7.

In this case, Lady Langford had presented a petition against Mr. Mahony for the taxation of certain costs. The case had been heard at the Rolls, and then on appeal before the late Lord Chancellor. The case on appeal is reported *ante*, vol. 5, p. 569.

A petition of re-hearing having been presented, Mr. *O'Brien* was about to open the petition, when—

The rule against re-hearing an appeal motion is not inflexible; but it is a sufficient ground for refusing it that the case has been already anxiously considered.

Serjeant *Warren* objected that an appeal could not be re-heard, and cited *Fox v. Mackreth* (a); *East India Company v. Boddam* (b).

Argument.

The LORD CHANCELLOR.

The doctrine in *Fox v. Mackreth* is quite consistent with principle. An appeal is of the nature of a re-hearing, and cannot be heard twice. The practice is so laid down in *Turner's Chancery Practice*, p. 734. Therefore I cannot re-hear this appeal. If this were allowed there would be no end to litigation. I will, however, let the matter stand, that the Counsel may look into the authorities.

Judgment.

Mr. *O'Brien* and Mr. *Maley* cited *Re Walkers minors* (c), as a precedent for a re-hearing of an appeal from the Rolls; and contended that the rule against it was at least not inflexible, and the importance of the present case called for a departure from it: *Deerhurst v. The Duke of St. Albans* (d); *Mousley v. Carr* (e);

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(a) 2 Cox, 158; S. C. 1 Harg. Jud. Arg. 451.

(b) 13 Ves. 421.

(c) Ll. & G. temp. Plunk. 136.

(d) 2 R. & My. 702.

(e) 3 M. & K. 205.

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Fournier v. Payne (a); *Byfield v. Provis (b)*; *Attorney-General v. Ward (c)*; *Waldo v. Caley (d)*; *Hodgens v. Hodgens (e)*.

Serjeant *Warren*, with whom was Mr. *Gayer*, contra, stated that he was Counsel in *Walkers minors*, and the re-hearing was acquiesced in without objection; and argued that though a case might be re-heard in the Court below, and then appealed from—*Brown v. Higgs (f)*, *Blackburn v. Jephson (g)*—the appeal cannot be re-heard; that if the rule is not inflexible, the very authorities cited on the other side showed the great difficulty of departing from it, and this was not a case therefore for doing so; and that at all events a previous application for leave to petition for re-hearing was necessary: *Byfield v. Provis (b)*; *Moss v. Baldock (h)*. He also cited *Mousley v. Carr (i)*.

THE LORD CHANCELLOR.

June 5.
 Judgment.

I am unwilling to exclude Mr. Mahony from the investigation he now asks; but the rule appears settled. It appears that a re-hearing is matter of discretion for the Court; and it is sufficient ground for refusing it that the case has been the subject of re-hearing before, and has been anxiously considered and decided. The rule has been even more emphatically laid down as excluding the reconsideration of motions. In this country the practice has been more strict, if possible, than in England; for here, by an old rule of the Court, there could be no re-hearing after two years; in England there may, at any time within twenty years. The rules which guide the discretion of the Court are the same here and in England, and I see no reason for any difference. There is a series of authorities on this point, beginning from *Vesey*, and extending to

(a) *Note 3 M. & K. 207.*

(c) *1 M. & Cr. 449.*

(e) *11 Bl. 62.*

(g) *2 Ves. & B. 359.*

(b) *3 M. & Cr. 437.*

(d) *16 Ves. 206.*

(f) *8 Ves. 561.*

(h) *1 Ph. 118.*

(i) *2 M. & K. 205.*

this day. I cannot lay it down that I have a wider discretion than the Courts in England. I will, however, look into the case as it was before my predecessor; and if I find it involves any matter of general practice and important to be settled, I may consider whether I will re-hear it. My present impression is, that it would be very inconvenient and against the general rule.

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It does not appear to me that this case involves any important general question, except perhaps what may arise out of the former order. The remainder of the case is also open between Mr. Mahony and Lady Langford in another way; and that is an additional reason why I should not allow it to be re-discussed on this motion. If the former order, as regards the claim for searches, went on the particular items, it is subject to the same rule; though it might have involved a question very important, in a general sense, as to the right to charge for searches.

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Judgment.

The petition for re-hearing must, therefore, be dismissed with costs.

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Rolls.

MERCER *Petitioner* ; M'KEE *Respondent*.

(In the Rolls.)

May 28, 31.

Joint judgment against A, B and C; A was the principal, and B and C sureties. A dies, judgment revived against B and C; C was the heir-at-law of A, but the revival was against him as one of the surviving consors and not as heir. The Court appointed a receiver on petition over the lands which had come to C by *quasi* descent from A the principal debtor.

Semble, as a general rule, where there is a joint judgment, and all the consors are principal debtors, and one of the consors dies, the Court will not appoint a receiver over the lands of the surviving consors alone. The judgment ought to be revived against the surviving consors, and the heir and tertenants of the deceased consor, and the Court should appoint a receiver over the lands of the heir and tertenants of the deceased consor as well as over the lands of the survivors, in order to enforce contribution.

An arrest under a *ca. sa.*, and discharge under the Insolvent Act, is not cause against the appointment of a receiver on the judgment.

THE petition in this matter was presented for the appointment of a receiver under the 5 & 6 W. 4, c. 55.

The petition stated that William M'Kee deceased, being indebted to the petitioner, together with Charles Maxwell, and the respondent Hugh M'Kee, executed their joint and several bond to the petitioner, with warrant of attorney to confess judgment thereon. That judgment was entered against the three consors in Trinity Term 1830; and that W. M'Kee having died, the said judgment was revived against Charles Maxwell and the respondent in Michaelmas Term 1846; and the petitioner was entitled to sue out execution on the judgment. That William M'Kee was at the time of the rendition of the judgment seised of the lands of Hill Hall under a lease for one life still in being, which lands were in the possession of the respondent as son and heir-at-law of the said William M'Kee.

A conditional order for the appointment of a receiver having been obtained, an affidavit was filed as cause against its being made absolute, which stated among other matters that Charles Maxwell and the respondent executed the bond in the petition mentioned as sureties only, and that in 1841 the petitioner took proceedings to recover payment of the amount due on foot of the judgment, and issued a *ca. sa.* under which the respondent was arrested and lodged in gaol. That after some negociation on the subject the respondent filed his petition under the Insolvent Act,

and was discharged as an insolvent debtor without opposition by the petitioner.

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Mr. *Burroughs*, for the respondent, contended that the conditional order should be discharged on three grounds. First, that the petitioner was not entitled to sue out an *elegit*, as the judgment was joint and had not been revived against the heir and tertenants of W. M'Kee the principal debtor; secondly, that the discharge under the Insolvent Act was a satisfaction of the judgment, as the petitioner was the detaining creditor (a); thirdly, he relied on the non-joinder of Charles Maxwell, against whom, as his co-surety, the respondent was entitled to contribution: *Hickson v. Aylward* (b).

Mr. *Hanna*, in support of the conditional order, argued that the judgment being joint survived against the two remaining conusors, and therefore it was sufficient to revive it against them only; that by the discharge under the Insolvent Act the person only of the respondent had been discharged, and that the doctrine of contribution had no application to a petition under the Judgment Acts.

The MASTER OF THE ROLLS said that, as to the discharge under the Insolvent Act, it was not an answer to the petition; and referred to *Rawson v. Hinds* (c), and *Hotham v. Somerville* (d), and also to the statutes in force in Ireland under which an *elegit* might issue although the debtor might have been discharged from imprisonment under a *capias ad satisfaciendum*: Note to *Rowe v. Murray* (e); and stated that he would consider the other objections.

The MASTER OF THE ROLLS.

The petition in this matter stated that William M'Kee being indebted to the petitioner, he, with Charles Maxwell and the res-

May 31.
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(a) See on this point *Maguire v. O'Reilly*, 9 Ir. Eq. Rep. 339.

(b) 3 Mol. 1.

(c) 1 Hud. & B. 599.

(d) 9 Beav. 63.

(e) 1 Hud. & Br. 308.

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pondent, entered into a joint bond to the petitioner. The principal debtor William M'Kee having died, the judgment was revived against the two surviving conusors, one of whom (the respondent) was heir-at-law of the deceased conusor.

The first point contended for before me by the respondent, which remains to be decided, is, that where there are three conusors, and one of them dies, and the judgment is revived against the two survivors, the creditor cannot prefer a petition under the 5 & 6 W. 4, c. 55, for the appointment of a receiver, without having had the judgment revived against the heir-at-law of the deceased conusor, and that the heir-at-law should be made a respondent in order that the lands descended may be made contributory. The petition must under the statute (31st section) be preferred by a person "entitled to sue out, or who has already sued out, a writ of elegit." It is necessary therefore to consider whether the petitioner in this case could have sued out an elegit on the judgment of revival against the two surviving conusors.

Sergeant *Williams*, in a note to *Trethewy v. Achland* (a), states the law thus :—" Although the judgment survives as to the personalty, yet it does not as to the real estate; for at Common Law the plaintiff might take the goods of the survivor in execution by a *feri facias*; but the plaintiff, under the Statute of Westminster 2, must sue out an elegit against the lands of the survivor and also of the heir and tertenants of the deceased, and must sue out a *scire facias* against the survivor and the heir and tertenants of the deceased. For it seems that where the *lands* of several are charged with a debt, it shall not lie wholly upon the survivor; as, if a recognizance be acknowledged by several, the lands of them all are thereby become chargeable, and execution must be equally made; and if one dies, the creditor must bring a *scire facias* against his heir and tertenants, and also against the survivors. But it is otherwise when the lands are not bound; as, if two enter into a bond and one dies before judgment, the survivor shall be charged alone: *Lampton v. Collingwood* (b). So where judgment in debt was had against two,

(a) 2 Saund. Rep. 50 a, note 4.

(b) 4 Mod. 315.

one died, the plaintiff brought *scire facias* against the survivor only; the defendant pleaded that the other had left lands and an heir upon whom they had descended, and demanded judgment if he should be compelled to answer without the heir being warned, to which the plaintiff demurred, and judgment was given that the defendant should answer; for the judgment is against the person. And although now by the Statute of Westminster 2, which gives the *scire facias* and elegit, he may charge the lands and make the judgment real, yet it is at his election to proceed against the personalty if he will. But if he will take out execution upon the *real lien*, the charge must be equally against both. But it was said that if he brings *scire facias* against both, and has judgment upon it, he may have a *fieri facias* against the survivor only, or an elegit against both." Sergeant *Williams* refers to *Smart v. Edsun* (a).

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The same doctrine is laid down in 7 *Bac. Abrid.* p. 142:—"If there be judgment in debt against two, and one die, a *scire facias* lies against the other alone, reciting the death; and he cannot plead that the heir of him that is dead has assets by descent, and demand judgment if he ought to be charged alone; for at Common Law the charge upon a judgment, being personal, survived; and the Statute of Westminster 2 (13 *Edw.* 1, stat. 1), that gives the elegit, does not take away the remedy of the plaintiff at the Common Law, and therefore the party may take out his execution which way he pleases, for the words of the statute are *sit in electione*. But if he should, after the allowance of this writ and revival of judgment, take out an elegit to charge the land, the party may have a remedy by suggestion, or by *audita querela*."

In an ordinary case, if there was a judgment against three, and one of the conusors died, I would not appoint a receiver unless the judgment was revived against the heir and tertenants of the deceased as well as against the surviving conusors. It would be quite reasonable, where the right to the receiver depends, under the statute, upon the petitioner having sued out, or being entitled to sue out an elegit, that this Court should enforce contribution in the

(a) 1 *Lev.* 30; S. C. Sir T. Raym. 26.

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same manner in which it is enforced in a Court of Law. But, although that ought to be the general rule, this case is singular in its circumstances.

The respondent who makes the objection was the heir-at-law of the deceased debtor. The *scire facias* did not notice the fact that he was heir of the deceased conusor, and the revival was against him in his own right as one of the surviving conusors. Now, it appears from *Bacon's Abr.*, that his remedy at law, if an elegit issued, would be by *audita querela* or suggestion. The objection by the *audita querela* (which is an equitable proceeding in a Court of Law) would be, that he was entitled in his character of surviving conusor, to contribution against himself, as heir of the deceased conusor. This might be a case for relief if the lands sought to be extended were lands which he had not become entitled to as heir; but in this case it is the lands which he is entitled to as heir, which the petitioner seeks to obtain the receiver over; and it is these lands which ought in equity to pay the entire amount of the judgment, because his father appears to have been the principal debtor.

In *Harbert's case* (a) it is laid down:—"Note, reader, where it is said before and often in our books that if one purchaser be only extended for the whole debt, that he shall have contribution; it is not thereby intended that the others shall give or allow to him any thing by way of contribution; but it ought to be intended that the party who is only extended for the whole, may by *audita querela* or *scire facias*, as the case requires, defeat the execution, and thereby he shall be restored to the mesne profits, and compel the conusee to sue execution of the whole land; so in this manner, every one shall be contributory—*hoc est*, the land of every tertenant shall be equally extended." It would also appear from *Dyer*, p. 331 *b*, and 332 *a*, and *Gilbert on Execution*, p. 45, that the elegit was not void, but should be defeated in a proper case by *audita querela* or *scire facias*. In the present case the respondent could not, I think, defeat a writ of elegit extending the lands which he took as heir, by showing that the judgment was revived against him in his

(a) 3 Rep. 14.

character of surviving conusor, and not in his character of heir of the deceased conusor.

With respect to the objection that Mr. Charles Maxwell should have been a respondent, and that a receiver should be appointed over the lands for the purpose of contribution, the answer is that the deceased conusor was the principal debtor, and that Mr. Maxwell was only a surety; and the respondent is the heir-at-law of the principal debtor, and the lands over which the receiver is sought descended upon him from the principal debtor.

Upon the whole, I think I ought to make the usual order of reference to appoint a receiver.

1847.
Rolls.
MERCER
v.
M'KEE.
Judgment.

CASEY v. CASEY.

THREE demurrers had been taken in succession to the bill. The demurrers were allowed by the plaintiff, and the bill was amended after each demurrer. The costs of the several demurrers were taxed and an attachment issued against the plaintiff for non-payment of them. The defendant not having answered in proper time after the last amendment, the cause was set down to be heard *pro confesso*. The cause was called on and a decree was pronounced, the defendant's Counsel not appearing. Shortly afterwards on the same day—

June 3.

Decree pro confesso against a defendant, although the plaintiff was in contempt when the cause was set down, the costs having been paid before the decree was pronounced.

Mr. *W. Smith*, for the defendant, objected that the cause had been irregularly set down, the plaintiff being in contempt in consequence of the non-payment of the costs of the demurrers, and therefore incapable of taking any step in the cause until the contempt was purged.

Argument.

The MASTER OF THE ROLLS gave permission to the defendant to serve notice to have the cause struck out of the list.

1847.

Rolls.

CASEY

v.

CASEY.

June 4.
Argument.

Mr. *Smith* moved accordingly, and in support of the motion cited *Chuck v. Cremer* (a); *Rickets v. Mornington* (b).

Mr. *T. K. Lowry*, contra, relied on *Wilson v. Bates* (c).

The motion stood over, that the plaintiff might remove the objection by paying the costs. The costs were paid, and on the following day the motion was mentioned again, when—

June 5. Mr. *Smith* contended that the objection was not removed, as the party was in contempt when the cause was set down and the decree pronounced. He cited *Clarke v. Dew* (d); *Turner v. Dorgan* (e); *Odell v. Hart* (f); *Valle v. O'Reilly* (g).

Judgment. The MASTER OF THE ROLLS said that he should make the decree as of this day (h), and there being no affidavit of merits refused to give the defendant leave to answer (i).

(a) 1 P. Cooper, 205.

(c) 3 M. & Cr. 197.

(e) 12 Sim. 504.

(b) 7 Sim. 200.

(d) 1 Russ. & M. 103.

(f) 1 Moll. 492.

(g) 1 Hog. 199.

(h) See 1 Parton Cooper's Reports, 1846-7, pp. 220, 221.

(i) *Delany v. Doolan* (Flan. & Kel. 182); *Cruise v. Sheil* (6 Ir. Eq. Rep. 132.)

1847.

Rolls.

WALKER v. WALKER.

June 10.

A sum of £22,407. 12s. 6d., Bank of Ireland stock, the property of Anne Walker, then a ward of Court, and who had married Thomas Hodgens, was settled by the direction of the Master in trust to pay the dividends to her separate use during her life, and after her death in trust to pay, assign and transfer the principal sum to the child or children of the marriage, as Anne Walker should appoint. Thomas Walker Hodgens was the only surviving child of the marriage.

A fund was vested in trustees in trust to pay the interest to one for life, and after her death to her children. The Court refused, even with the consent of the mother, to advance any part of the principal for the maintenance of the minor, the consent being in another respect objectionable.

A bonus of £5 per cent. on the stock amounting to £1172. 0s. 10d. having been paid by the sanction of the Governor and Directors of the Bank of Ireland, and lodged in Court to the credit of this cause, the Lord Chancellor ordered, on the petition of Thomas Walker Hodgens, that it should be considered capital, and should be invested upon the trusts of the settlement (a).

Statement.

A consent bearing date the 17th of April 1847 was signed by Mrs. Hodgens, that the Accountant-General should, out of the said sum of £1172. 0s. 10d. stock, transfer to Thomas Hodgens so much of the said sum as at the price of the day, with the approbation of the Master, would be equivalent to the sum of £500 cash, and should also transfer to the said Anne Hodgens, or her attorney thereto lawfully authorised, so much of the stock as at the price of the day, with the like approbation, would be equivalent to the sum of £500 cash; and should also transfer to Alfred Barrett and Henry Walker, the respective solicitors, so much of the said stock as would be equivalent to the amount of their costs when taxed; and do also transfer to the said Anne Hodgens, or her attorney thereto lawfully authorised, the balance, if any, of the aforesaid sum of £1172. 0s. 10d. stock, with all the remaining interest due on same, or to become due up to the day of said transfer.

(a) See *In re Hodgens*, ante p. 99.

1847.
Rolls.
 WALKER
v.
 WALKER.

A petition was presented by Thomas Hodgens, the father and next friend of the minor Thomas Walker Hodgens, stating that he was unable to provide in a suitable manner for the maintenance and education of the minor, who, although entitled to a large property on the death of his mother, was without any present provision, and praying that the consent should be made a rule of Court.

Argument. Mr. *Robert Ferguson* moved on the petition, and submitted that by the consent of the tenant for life the bonus had become an interest in possession; and that under the peculiarly hard circumstances of the case, the Court should make the consent a rule of Court. He cited *Evans v. Massy* (a); *Barlow v. Grant* (b); *Mole v. Mole* (c); *Greenwell v. Greenwell* (d); *Cavendish v. Mercer* (e); *Ex parte Kebble* (f); *Errat v. Barlow* (g); *Haley v. Bannister* (h).

THE MASTER OF THE ROLLS.

Judgment. The facts of the case are these:—Mrs. Hodgens, then Miss Walker, was a ward of the Court of Chancery, and entitled amongst other property to a sum of £22,407. 12s. 6d., Bank of Ireland stock. She married Mr. Hodgens without the leave of the Court, and her property was settled on her for life to her sole and separate use, and upon her decease upon her children.

It appears from the report of this case that she eloped from her husband. An application was made to Sir William M'Mahon for a maintenance for her children. He thought that under the circumstances he was justified in allowing a maintenance out of her separate estate; but Sir Edward Sugden thought otherwise and reversed the order on appeal (i). Lord Plunket reversed Sir E. Sugden's order and supported the decision of the Master of the Rolls (k).

(a) 1 Y. & J. 196.

(c) 1 Dick. 310.

(e) 5 Ves. 195.

(g) 14 Ves. 202.

(i) See *In the Matter of Anne Hodgens*, L. & G. temp. Sug. 299.

(k) L. & G. temp. Pl. 136.

(b) 1 Vern. 254.

(d) 5 Ves. 194.

(f) 11 Ves. 604.

(h) 4 Mad. 278.

Upon appeal to the House of Lords, Lord Plunket's decision was reversed and Sir Edward Sugden's set up; the House of Lords holding that the children had no right in law or equity during the life of their mother to be maintained out of the separate estate while their father was living. The case is reported under the name of *Hodgens v. Hodgens (a)*. The result of the decision was that Mrs. Hodgens became entitled to apply the whole of the interest of her large fortune to her own use. A bonus having been declared on the Bank of Ireland stock, amounting to about £1100, and Mrs. Hodgens having claimed to be entitled to the bonus, the Lord Chancellor has decided that it forms part of the capital. Considering it as capital, it is governed by the settlement, and therefore Mrs. Hodgens is only entitled to the interest of that sum. Mrs. Hodgens having failed in that application, the plan adopted has been this—the husband and wife entered into a consent that the bonus should be divided between them, and in consideration of Mrs. Hodgens having £500 of the stock transferred to herself she has consented to allow her husband the other £500 in order that he may apply it to the education of the minors. It is also proposed that the balance of the £1100 stock after payment of the solicitor's costs shall be transferred to Mrs. Hodgens. I cannot consent to be a party to this bargain, by which £1100 bank stock, which is the property of the minors subject to the life interest of the mother, is to be disposed of in the manner proposed.

Independently of the objectionable nature of the arrangement by which it is proposed to induce the mother to consent to £500 being applied to the education of her child, I think the application is unsustainable in point of law. It is a general rule of the Court that maintenance shall be raised and payable out of property vested and in possession, and not contingent or in reversion. The cases on the subject are collected in *Chambers on Infancy*, pp. 263, 356 and 357.

In the case of *Evans v. Massy*, which was referred to, the fund was directed to accumulate until two infants should attain twenty-one, allowing part of the interest for maintenance, with

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Rolls.
WALKER
v.
WALKER.
Judgment.

(a) 4 Cl. & Fin. 323.

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Judgment.

benefit of survivorship if either died under twenty-one. The Court, holding that there was an equal chance of survivorship, and the parties to whom the fund was given over consenting, granted with reluctance a sum out of the principal, not for the maintenance of the minor, but for his advancement in life by the purchase of a commission. But the Lord Chief Baron expressed a doubt whether they were not stretching the authority of the Court. The other cases referred to appear to me to have no bearing on the question in this case. In no case that I am aware of has the Court permitted a mortgage or assignment of a portion of an estate or interest in remainder belonging to a minor, for the purpose of providing a present maintenance. Mrs. Hodgens was a minor so lately as the years 1834 or 1835. She may live for a number of years. This sum of £500 will not last long, and I should have applications of the same kind again.

Independently of the general principle, I do not think the Court ought to sanction so objectionable a proceeding as this, by which it is sought, contrary to the Lord Chancellor's decision, to give a moiety of the fund to this person, who is so forgetful of her moral duty as to require the transfer of a portion of the fund to herself to induce her to contribute to the support of her child.

The motion must be refused.

1847.
Rolls.

CONNATTY v. O'REILLY.

SAME v WALSH.

June 16.

By an order made on consent on the 11th of May 1847, a certain fund was directed to be divided among the parties to these causes; a portion of it was to be paid to Margaret Teresa Walsh, she undertaking thereby to pay the costs of the defendants Boylan and M'Cabe, as between solicitor and client, and it was ordered that a dwelling-house and premises in Kingstown be conveyed to the defendant Margaret Teresa Walsh for her life, and from and after her decease said dwelling-house to revert to the plaintiffs.

The Court will not on the application of the client, set aside an order made on a consent signed by his solicitor, on the allegation that he acted without authority, there being no case of fraud or misrepresentation.

The consent on which the order was made had been signed by the solicitor for Margaret Teresa Walsh.

Mr. *Radcliff*, for Margaret Teresa Walsh, moved that the order might be discharged or varied, by omitting that portion whereby she undertook to pay the costs of the defendants Boylan and M'Cabe, and by omitting after the words, "that the dwelling-house and premises situate at Kingstown be conveyed to Margaret T. Walsh," the words or limitation "for her life, and from and after her decease, said dwelling-house to revert to the plaintiffs," or that the consent might be set aside, and all further proceedings set aside. He contended that the signing of the consent had not been authorised, and was not within the scope of the solicitor's general authority, therefore that the Court had power to set aside or vary the order: *Peed v. Cussen* (a); *Davenport v. Stafford* (b); *Butter v. Ommanney* (c).

Argument.

Mr. *Drury*, for the plaintiff, contended that the Court had not the power to vary the order. Even the Lord Chancellor could not set

(a) 4 Dru. & War. 199.

(b) 8 Beav. 503.

(c) Tam. 345.

1847.
Rolls.
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 v.
 O'REILLY.
 Judgment.

aside a consent order except in the case of fraud or misrepresentation: *In re Hobbler* (a); *Peed v. Cussen* (b).

The MASTER OF THE ROLLS.

I am of opinion that no sufficient ground has been shown in this case for setting aside the order made on consent. The general doctrine is laid down thus in *Daniel's Cham. Prac.*, vol. 2, p. 967. "It may be mentioned with reference to the subject of consent causes, that a decree or order made by consent of the Counsel for the parties cannot be set aside either by re-hearing or appeal, or by bill of review, unless by clerical misprision any thing has been inserted in the order as by consent to which the party had not consented, in which case Lord Thurlow appears to have considered that a bill of review would lie; if, however, the decree has been obtained by fraud, relief may be had against it by original bill. The consent of Counsel to a decree is to be given upon their conception of the authenticity of their instructions, and as the client is bound by the act of his Counsel, he must, if the Counsel has consented without sufficient authority, seek his remedy against the Counsel." In the case of *Filmer v. Delber* (c), an order of reference had been made with the consent of the Counsel and attorney, and the arbitrator had done nothing more than appoint a meeting; the defendant moved to set aside the order of *Nisi Prius*, on an affidavit stating that she had expressly desired her attorney not to consent to any rule of reference; and the Court refused the motion, saying, that the defendant's remedy was by action against the attorney. In *Mole v. Smith* (d) Lord Eldon said, "It is for Mr. Shadwell to consider whether he is authorised to give his consent for the widow. If he does I must act upon it and she will be bound by it." Several other cases are referred to in *Thomas v. Hewes* (e), and in *Stanhope v. Firmin* (f), which establish that the client is bound by the consent of his Counsel or attorney; and the case of *In re Hobbler* (g) is to the same effect. So also Lord

(a) 8 Beav. 101.

(c) 3 Taunt. 486.

(e) 4 Tyr. 326.

(b) *Ubi supra*.

(d) 1 Jac. & Wal. 673.

(f) 3 Bing. N. C. 301.

(g) 8 Beav. 101.

Lyndhurst's observation, in *Hewitt v. Melton* (a). In cases of fraud or misrepresentation the Court might possibly relieve on motion. In *Thomas v. Hewes*, Baron Bolland said: "In cases of fraud or gross misconduct of the attorney, a Court might set aside an order of Court made on agreement of the parties." And in *Peed v. Cussen*, Sir E. Sugden said: "*Butter v. Ommanney* shows that an order made upon consent may be varied if it was made upon a misrepresentation, but the general rule is, that the Court cannot relieve against any order or decree made upon consent."

There is no allegation of fraud or misrepresentation in this case, and the motion must be refused with costs.

(a) 4 Tyr. 1012.

1847.
Bolla.
CONNATTY
v.
O'REILLY.
Judgment.

WATTERS v. WATTERS.

MR. PENNEFATHER moved that Edward Dunroche and David King Fawcett might be at liberty to lodge in the Bank of Ireland to the credit of the cause the sum of £369. 4s. 7½d. in discharge of the recognizance entered into by them as sureties for W. Grace, the late receiver in this cause, being the full amount thereof, and that all proceedings on foot of the recognizance be stayed, and that the Clerk of the Recognizances might be directed to enter a vacata for the sureties.

Mr. M'Dermot, with whom was Mr. Hickie, for two defendants in the cause, Charles and Thomas Watters, moved a cross notice that the sureties might be ordered to pay to the solicitor of the defendants the costs incurred in removing William Grace from the receivership, and in putting his recognizance in suit, and also the

June 16, 17.

A receiver's sureties are not liable beyond the amount of the recognizance. The sureties having paid the amount of the recognizance into Court, *Held*, that they were not liable to the costs of removing the receiver who was in default, and of appointing a new receiver, nor to the costs of a *sci. fa.* against themselves or their principal.

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costs of several writs of *scire facias* against the receiver and his sureties, and for a taxation of the costs.

In support of the original motion, *Keily v. Murphy* (a); *Bell v. Tape* (b); *Feely v. Kilkenny* (c): against it, and in support of the cross motion, *Regina v. Bayly* (d); *Rex v. Fenton and Motherwell* (e); *Walker v. Wild* (f); *Maunsel v. Egan* (g); 3 & 4 Vic. c. 105, s. 59, were cited.

June 17.
Judgment.

THE MASTER OF THE ROLLS.

The point which arises in this case has been the subject of decision in *Keily v. Murphy*. In that case an application was made by the defendant Hobart, who had joined in a recognizance as surety for a tenant under the Court. The tenant did not pay the rent, and an attachment was obtained against him by the receiver, the costs of which amounted to £37. The receiver also sued out separate writs of *scire facias* on the recognizance against the tenant and each of the sureties. Hobart the surety filed a plea of payment to the *scire facias* against himself, but afterwards withdrew the plea before trial, and judgment was entered against him. The costs of the action upon the *scire facias* against Hobart, independently of the actions against his principal and co-surety, amounted to £22; and he applied to stay the proceedings upon his recognizance, and for a reference to ascertain the sum due on foot of arrears of rent. Three questions were raised before Sir Michael O'Loughlen. First, that the surety was not liable even to the extent of his recognizance for any costs of the attachment against the tenant. Secondly, that he was not liable to any costs of the action upon the recognizance against the principal and his co-surety. Thirdly, that he was not liable to any costs of the action against himself.

All these points were given up except the last. With respect to that question, Sir Michael O'Loughlen came to the conclusion that

(a) *Sau. & Sc.* 479.

(b) *Hil. T.* 1833, cited in *Keily v. Murphy*.

(c) Since reported, 10 *Ir. Eq. Rep.* 423. (d) 1 *Dr. & War.* 213.

(e) *Smith & B.* 40.

(f) 1 *Mad.* 528.

(g) 8 *Ir. Eq. Rep.* 372; *S. C.* on appeal 9 *Ir. Eq. Rep.* 283.

the statute 21 & 22 G. 3, c. 20, which gave costs to the Crown, did not apply to the costs of proceeding upon a tenant's recognizance; for, though nominally a debt to the Crown, it is really a debt between subject and subject. He held therefore that the surety was not bound to pay the costs of a *scire facias* against himself. He says, p. 491:—"This case is not a proceeding in which, under the 21 & 22 G. 3, c. 20, the King would be entitled to costs; it is a proceeding not for a debt due to the King, but on behalf of a subject."

In the course of his judgment he adverted to many cases decided in Ireland, in which the distinction had been taken between a debt due to the Crown in its own right and a debt due to the Crown as a trustee for the subject, and he said that it had been considered in this country, that a plea of payment under the 8 G. 1, c. 4, would be a bar to a *scire facias* on a receiver's recognizance, the Courts recognising the distinction. That question, however, came before Sir Edward Sugden in *Regina v. Bayley (a)*, and it was decided that a plea of payment under the 8 G. 1, c. 4, to a *scire facias* on a receiver's recognizance was bad on demurrer, on the ground that the Crown being a royal trustee for the subject did not prevent the application of the usual rule, that the King is not bound by an Act of Parliament unless specially named. Sir Edward Sugden adverted to the observations of Sir Michael O'Loughlen in *Keily v. Murphy*, that the rule had been considered to be otherwise in this country, and dissented from that opinion. But when Sir Edward Sugden came to observe on the 21 & 22 G. 3, c. 20, he said, "That Act deals solely with debts really due to the Crown; and it surely does not follow that, because there may be a number of statutes dealing expressly with recognizances for such debts to the Crown, therefore, this statute (8 G. 1, c. 4,) must be confined to like debts." Although Sir Edward Sugden dissented from the opinion expressed by Sir Michael O'Loughlen in *Keily v. Murphy* in relation to the Act of the 8 G. 1, his observations to which I have referred affirm rather than overrule the decision of *Keily v. Murphy* upon the

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Rolls.
WATTERS
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WATTERS.
Judgment.

(a) 1 Dr. & War. 218; S. C. 4 Ir. Eq. Rep. 142.

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 v.

WATTERS.

Judgment.

construction of the 21 & 22 G. 3. My own opinion is, that there is no sound distinction between the question in *Regina v. Bayley* and that in *Keily v. Murphy*.

However, the case of *Keily v. Murphy* was well considered, and a very elaborate judgment was delivered by Sir Michael O'Loughlen; and Sir E. Sugden having appeared to consider that his decision in *The Queen v. Bayley* did not overrule or affect *Keily v. Murphy*, I think it better to follow the decision in the latter case.

I do not think the statute of *Victoria* applies to this case. I have already held that the 26th section of that Act does not apply to a receiver's recognizance, and the Lord Chancellor has affirmed the decision.

Order.

Be it so, on the original notice; and declare that Charles and Thomas Watters, as against the fund in bank, are entitled to the costs of suing on the recognizance, removing the receiver, and appointing a new receiver, and of appearing on this motion; and refer it to the proper officer to tax the same; and on production to the Accountant-General of this Court of the certificate of such taxation, thereupon let the Accountant-General of this Court draw in favour of the said Alexander Foster for the amount of said costs when taxed and ascertained.

Rolls Motion Book, 251, fol. 178, 1847.

1847.
Rolls.

HARVEY, *Petitioner* ; WALLACE, *Respondent*.

GIBBINGS, *Petitioner* ; SAME, *Respondent*.

June 19.

THE petition in the second matter prayed that a receiver might be appointed, or the receiver in the first matter extended, to pay the sum due on foot of the judgment in the second matter. The petitioner in the second matter had been appointed receiver in the first matter. The respondent consented to his acting as receiver in both matters. But the Court said—

The petitioner in the second matter was receiver in the first. The Court refused to extend him to the second matter, though the respondent consented.

No Rule—the petitioner declining to take an order for the appointment of a new receiver in both matters.

Rolls Petition Book, 18, fol. 296, 1847.

STEELE *v.* DEVONPORT.

June 10.

MR. HOBART, for the plaintiff, moved that he might be at liberty to bid at the sale of lands set up to be sold under a decree. The plaintiff was the first incumbrancer, and his demand amounted to £3500. The land to be sold was worth about £100 a-year: *Spaight v. Paterson* (a).

Leave to the plaintiff to bid at the sale, without taking from him the carriage of the decree, where he was the first incumbrancer, and the property clearly insufficient to pay his demand.

The MASTER OF THE ROLLS made the order.

(a) 9 Ir. Eq. Rep. 149.

1847.
Rolls.

EVANS v. O'DELL.

June 3.

This Court has power on motion to review a report confirmed by the operation of the 137th General Order.

MR. HUGHES, on behalf of Michael O'Brien, a reported creditor, moved that so much of a sum of £496. 16s. 9d. stock, directed to be transferred to Henry White, Esq., the purchaser, by an order of the 15th of June 1846, as would amount to £144. 4s. 6½d., being the balance of a gale of rent which became due on the 29th of September 1843, and which was by mistake brought to the credit of Henry White in the allocation report of the 13th of June 1846, be transferred to the said M. O'Brien; and if necessary, that it might be referred to the Master to review the said report in relation to the rents of the lands of Gurteenaheron and Downs, received by Daniel Dixon Power the receiver in this cause, from the tenants of the said lands, from the 29th of September 1843, from which period the purchaser was declared entitled to the rents of the said lands; and that the said Master do certify how much of said rents were received by the said receiver on account of the gale of rent of said lands due and ending on the 29th of September 1843, and which were alleged to be paid. Henry White, Esq., had not lodged the remaining three-fourths of his purchase money until *after* the 29th of September 1843, and was therefore not entitled to that gale of rent, which had been by mistake allocated to him.

Argument.

Mr. John Brooke and Mr. Sherlock, for the purchaser, objected that as the report had been confirmed by the operation of the 137th General Order, the Court had no power to review it on motion, and cited *Turner v. Turner (a)*, *Turner v. Turner (b)*.

Mr. Hughes, in reply, relied on *Hacket v. Donnelly (c)*.

(a) 1 Swanst. 54.

(b) 1 Jac. & W. 39.

(c) 1 Ir. Eq. Rep. 23.

The MASTER OF THE ROLLS.

I think I have power to amend an error which has been accidentally made in a report. In the cases cited, the report was confirmed, not by lapse of time under the General Order of the Court, but by a decree.

In *Turner v. Turner* the report had been confirmed by a decree of the Master of the Rolls. In the case of *Hacket v. Donnelly*, Sir Michael O'Loghlen made an order which corrected an error in a report after decree. There is no doubt that a strong case must be made to induce the Court to entertain a motion to review a report, whether confirmed under the 137th General Order or by an order or decree of the Court (a); but under the circumstances of this case I think I may make an order. The only difficulty I feel is as to the form of the order.

The purchaser's Counsel then consented, and the following order was made:—

Colonel White, by his Counsel in open Court, so consenting, let the Accountant-General, out of the sum of £496. 16s. 9d. Government 3½ per cent. stock in the Bank of Ireland, standing to the credit of this cause, transfer to the said Michael O'Brien so much of said stock as at the price of the day, on the 23rd of December last, will, with the approbation of the Master, be equivalent to the sum of £144. 4s. 6½d., being the amount of a half year's rent of the lands of Gurteenaheron and Downs allocated to the said Henry White, the purchaser thereof, by the report bearing date the 12th day of June 1846, which accrued due on the 29th day of September 1843 (being the gale-day previous to the lodgment of the said Henry White's remaining three-fourths of his purchase money), on account of said Michael O'Brien's demand in this cause, as the creditor next in priority as ascertained by said report; and let the parties abide their own costs of this motion.

Rolls Motion Book, 249, fol. 379, 1847.

(a) See Daniel's Chancery Practice, vol. 2, 1241.

1847.
Rolls.
EVANS
v.
O'DELL.
Judgment.

Order.

1847.

Rolls.

DOYLE v. DUMONCEL.

June 11, 12.

A bill of interpleader having been filed against husband and wife, separate sub-pœnas and notices were served under an order for the substitution of service, requiring them to appear and answer at different times. The husband appeared and filed a separate demurrer, which the plaintiff set down to be argued, and afterwards moved to set aside for irregularity. The Court refused the motion and made an order *nunc pro tunc* that the husband and wife should defend separately.

By a deed of separation a husband and wife conveyed the wife's property to a trustee in trust to pay an annuity to the husband, and the residue, after payment of her debts, to the wife, and the trustee covenanted to pay the annuity to the husband. The wife afterwards required the trustee not to pay the annuity to the husband; alleging, on the opinion of foreign Counsel, that the marriage was void. The husband brought an action of covenant for the annuity against the trustee, who having lodged the amount in bank filed a bill of interpleader against the husband and wife. Demurrer to the bill by the husband allowed with costs.

THE bill, which was filed on the 20th of April 1847, stated, that by an indenture bearing date the 14th of January 1840, made between Charles Bour Dumoncel, one of the defendants, late a Captain in the Regiment of Guards in the service of the King of Belgium, of the first part; Maria Alicia Bour Dumoncel, otherwise Hobson, otherwise Le Hunte, another defendant, of the second part, and the plaintiff of the third part; reciting that a marriage had been duly had and celebrated between the said C. B. Dumoncel and M. A. B. Dumoncel, according to the rites and ceremonies of the Church of England, but that no settlement had been executed upon the occasion of said marriage; and reciting further, that the said M. A. B. Dumoncel was, at and previous to the period of the said marriage, entitled during her life, under settlements executed on her marriage with S. M. Hobson, her former husband, to a jointure of £400 a-year, and to a third of the rents of certain lands which came to her on the death of her brother, and the interest on a sum of £5000 vested in the name of trustees in Government securities; and reciting that in consequence of some unhappy differences having arisen between the said C. B. Dumoncel and M. A. B. Dumoncel, they had mutually agreed to live separate, and that it had been agreed that the said C. B. Dumoncel should receive during their joint lives, out of the several properties to which the said M. A. B. Dumoncel was entitled at the time of her marriage, an annuity of £333, and that he should be free from all the debts and liabilities of the said M. A. B. Dumoncel, or any debts she might thereafter con-

tract; and that the said M. A. B. Dumoncel should receive for her maintenance and support, and the maintenance and support of her children by the said S. M. Hobson, her former husband, all the rest of the rents, interest and jointure: it was witnessed that in consideration of the covenants and agreements on the part of the plaintiff, the said C. B. Dumoncel covenanted with the plaintiff that the said M. A. B. Dumoncel might live separate and apart from her husband as if she was sole and unmarried, and should be free from his control, and that he would not claim any greater share of the property of the said M. A. B. Dumoncel than the sum thereby secured to him. And it was further witnessed, that C. B. Dumoncel and M. A. B. Dumoncel, according to their respective interests, assigned to the plaintiff all the above named rents, dividends, interest and jointure, in trust to pay to C. B. Dumoncel and his assigns for his life an annuity of £333, and then upon trust to pay and discharge any debt or incumbrance created by the said M. A. B. Dumoncel which the said C. B. Dumoncel should have been compelled to pay, and then to pay all the rest, residue and remainder of the said rents, interest and jointure, after payment of said annuity of £333, to M. A. B. Dumoncel for her sole use and benefit during her life. And the plaintiff covenanted with C. B. Dumoncel and M. A. B. Dumoncel, and each of them, &c., that he would apply, from time to time, all such sums of money as he should receive by virtue of the said deed in the manner therein provided, according to the true intent and meaning thereof.

The bill further stated, that for some years C. B. Dumoncel and M. A. B. Dumoncel acquiesced in the said indenture, and the plaintiff continued regularly to receive the rents and profits of the trust funds, and apply the same to the provisions of the said indenture; but that in or about the 17th of March 1845, Michael Mortimer, the plaintiff's solicitor, received a letter and notice from the solicitor of M. A. B. Dumoncel, desiring the plaintiff and his solicitor, for the reasons stated in said notice, to discontinue all future payments of the said annuity to C. B. Dumoncel, and henceforth to make all payments on account of the trust funds without any deductions to M. A. B. Dumoncel.

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The bill then stated that the plaintiff submitted a case to an eminent Queen's Counsel, and that he was advised to lodge in the Bank of Ireland the sum which he otherwise would have remitted to C. B. Dumoncel; and that in accordance with this opinion, after communicating his intention to C. B. Dumoncel, he had lodged in the Bank of Ireland four several gales of the annuity. That he had received various applications and demands for payment by and on the part of C. B. Dumoncel, and had also received several letters and notices on the part of the said M. A. B. Dumoncel cautioning him against any payment to the said C. B. Dumoncel, and was in hopes that he would not have been harrassed with any legal proceedings in respect of the said annuity. The bill charged that C. B. Dumoncel and M. A. B. Dumoncel claimed respectively to be entitled to the said annuity, and that the former had commenced an action against the plaintiff for five gales of the annuity. That a gentleman of the name of Rochfort had called upon the plaintiff and on his solicitor on behalf of M. A. B. Dumoncel, for the purpose of endeavouring to prevail on the plaintiff to pay her the money so lodged in bank, and produced two legal opinions, one purporting to be the opinion of a Belgian Counsel, and the other of a Jersey Lawyer, and both to the effect that there was no legal marriage between the said C. B. Dumoncel and M. A. B. Dumoncel. The bill prayed that the defendants might be decreed to interplead, and adjust their rights between themselves, and that it might be ascertained in such manner as the Court should direct, to which of them the said annuity belonged and ought to be paid, the plaintiff offering to pay into bank the arrears; and an injunction to restrain the action and all other proceedings at law, touching the matters in question in this suit.

An order was obtained by the plaintiff, that service of subpoena and notice for the defendant C. B. Dumoncel be deemed good service by serving same on his attorney at law; and an order was made under the statutes 2 W. 4, c. 33, and 4 & 5 W. 4, c. 82, to serve M. A. B. Dumoncel residing in England. Separate subpoenas and notices were served on the defendant, requiring C. B. Dumoncel to appear in eight days and answer in two months, and requiring

M. A. B. Dumoncel to appear in three weeks and answer in three months. Separate appearances were accordingly entered by the defendants. On the 26th of April 1847, an injunction was obtained to restrain the proceedings at law.

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The defendant C. B. Dumoncel having appeared on the 6th of May, filed a demurrer on the 14th of May. The causes of demurrer were, want of equity, and that the bill did not show any right or title to compel the defendants to interplead.

On the 22nd of May the plaintiff set down the demurrer to be argued. The cause was called on, and a preliminary objection having been made that the demurrer was irregularly filed, the cause stood over, with liberty to either party to serve such notice as they might be advised. The plaintiff accordingly, on the 8th of June, served a notice of motion that the separate demurrer filed by C. B. Dumoncel should be taken off the file, or otherwise set aside, same having been filed without any order of the Court previously obtained for that purpose; and that the appearances already entered by the defendants be also set aside, and that they might be ordered to enter separate appearances, and be at liberty to enter separate answers, pleas or demurrers to the plaintiff's bill, as they might be advised; and in default of their so doing within the period allowed by the rules of the Court, that the plaintiff might be at liberty to enter up process, or move to have the bill taken as confessed against them. The defendant C. B. Dumoncel served a cross notice that the demurrer be argued forthwith, notwithstanding the preliminary objections raised by the plaintiff; and if necessary, that the separate appearance and demurrer entered for and filed by C. B. Dumoncel be declared regular *nunc pro tunc*. An affidavit was made by his solicitor in support of the latter motion, stating that he was advised, from the nature of the bill, that it was necessary that the said defendant should be at liberty to appear and demur, plead or answer separately from his wife.

Mr. Serjeant *Warren* and Mr. *Drury*, for the plaintiff, in support of the motion to take the demurrer off the file, contended that the demurrer was filed against the settled practice of the Court, which

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required an order to enable a husband or wife defendants to answer separately, and was therefore a nullity: 1 *Dan. Chan. Pr.*, 2nd ed., pp. 457, 545; *Barron v. Grillard* (a); *Barry v. Cane* (b); *Gee v. Cottle* (c); *Estcourt v. Ewington* (d); *Lethley v. Taylor* (e); *Tarlton v. Dyer* (f); *Naylor v. Byland* (g); *Dorrien v. Livingston* (h); *O'Brien v. Bernard* (i); *Travers v. Bulkely* (k); and could not therefore be waived by setting down the demurrer: *Wall v. Stubbs* (l); *Bilton v. Bennet* (m); *Thompson v. Lockwood* (n).

Mr. *Christian* and Mr. *Orpen*, for C. B. Dumoncel, moved the cross notice, and contended that the irregularity was the consequence of the plaintiff's own proceedings, and had been waived by him; but even if it was not waived, there was abundant authority to empower the Court to make an order *nunc pro tunc* that the defendants should appear and answer separately: *Chambers v. Bull* (o); *Garey v. Whittingham* (p); *Barry v. Cane* (q); *Rooney v. Fox* (r); *Duke of Chandos v. Talbot* (s); *Fitzpatrick v. Hacket* (t); *Sidgier v. Tyte* (u); *Fry v. Mantell* (v).

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Judgment.

An application is made in this case on the part of the plaintiff that the separate demurrer filed by the defendant Charles Bour Dumoncel be taken off the file or otherwise set aside, same having been filed without any order previously obtained for that purpose, and that the appearances already entered by the said Charles Bour Dumoncel and by Maria Alicia Hobson be also set aside, and that

(a) 3 V. & B. 165.

(c) 3 M. & Cr. 180.

(e) Id. Ibid.

(g) Id. Ibid.

(i) 7 Ir. Eq. Rep. 180.

(l) 2 Ves. & B. 354.

(m) 8 Ir. Eq. Rep. 367.

(p) 1 Sim. & St. 163.

(r) 1 Jones, 437.

(t) Sau. & Sc. 134.

(b) 3 Mad. 472.

(d) 9 Sim. 252.

(f) 9 Sim. 253.

(h) Id. Ibid.

(k) 1 Ves. 384.

(n) 4 Sim. 17.

(o) 1 Anst. 269.

(q) 3 Mad. 472.

(s) 2 P. Wms. 370.

(u) 11 Ves. 202.

(v) 4 Beav. 485.

the said Charles Bour Dumoncel and Maria Alicia Dumoncel be ordered to enter separate appearances, and be at liberty to file separate answers, pleas or demurrers to the plaintiff's bill, as they may be advised; and in default of their doing so within the period allowed by the rules of the Court, that the plaintiff may be at liberty to enter up process or to move to have the bill taken as confessed against the said C. M. Dumoncel and M. A. Dumoncel.

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The plaintiff Doyle is the trustee of a deed of separation, which was entered into between the defendants C. B. Dumoncel and M. A. Dumoncel, otherwise Hobson. The latter, when she married Mr. Dumoncel, was a Mrs. Hobson. The deed recites the marriage, and that no settlement had been made on the occasion; and by it the property of both the husband and wife are conveyed to the plaintiff as trustee; one of the trusts being to pay an annuity to Mr. Dumoncel who has taken the demurrer. The lady has taken the singular course of trying to invalidate her own marriage, and to show that she is not the wife of Mr. Dumoncel at all. The bill states the opinions of a Belgian and a Jersey Counsel to that effect, and calls upon the defendants to interplead, Mr. Dumoncel having brought an action at law against the plaintiff to recover the annuity. The bill having been filed, the plaintiff sued out two separate subpœnas, and obtained an order to substitute service on the attorney of Mr. Dumoncel in the action at law, and an order to serve Mrs. Dumoncel out of the jurisdiction, pursuant to the statutes 2 *W.* 4, c. 33, and 4 & 5 *W.* 4, c. 82. Separate subpœnas were accordingly served, calling on the defendants to appear and answer at different times, and separate appearances were entered, and Mr. Dumoncel filed a demurrer. The plaintiff set down the demurrer for argument, following up the form of his own proceeding, by which he calls upon the defendants to interplead. The demurrer was set down in the list of causes and called on a week ago, and now the plaintiff who set down the demurrer to be argued moves to take it off the file, alleging that the proceedings are irregular; that the defendant Mr. Dumoncel should not have entered a separate appearance, and that the defendants should not interplead, although he has called on them by his bill to do so.

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If Mr. Dumoncel had applied for an order to appear and demur separately, the plaintiff could not have resisted the application. The whole frame of the suit shows that the defendants must appear and defend separately, and unless good cause had been shown on the part of the wife the Court would, almost as a matter of course, have allowed the defendants to appear and answer, plead or demur separately. The plaintiff could not have resisted such an application, because he calls on the defendant by the notice which was served with the subpoena to do the very thing which he now complains of.

Let the defendant Maria Alicia Hobson be at liberty to file an answer, plea or demurrer in this cause separate and apart from the defendant Charles Fortune Bour Dumoncel, and in case such answer, plea, or demurrer be not filed within the period limited by the rules of the Court, let the plaintiff be at liberty to proceed against the said defendant Maria Alicia Hobson in this cause as he may be advised, first serving notice on the solicitor who appeared in this cause for the said defendant; and no rule on the rest of said motion, and let the parties abide their own costs of this motion.

Rolls Motion Book, 250, fol. 278, 1847.

The demurrer was then called on to be argued.

Argument. Mr. Orpen and Mr. Christian, in support of the demurrer.

Mr. Drury and Mr. Sergeant Warren contra.

The main ground relied on support of the demurrer was, that there was no conflict of rights between the defendants, their rights having determined by the deed of separation, which so long as it remained unimpeached was binding on the plaintiff and defendants.

On the other hand it was argued, that all the requisites for inter-

pleader were to be found in this case; the plaintiff had no interest; there was a double claim by the defendants to the same subject, and that claim could be effectually litigated between the defendants. It was asserted that C. B. Dumoncel was an alien, which would raise a further question between the defendants, as to whether he could take under the deed. To prove the fact, it was contended that the plaintiff was entitled to read the notice referred to in the bill and sent in the letter from the solicitor of M. A. B. Dumoncel on the 17th of March 1845, which was by reference incorporated in the bill, and the truth of which was therefore admitted by the answer.

The following authorities were cited:—

Johnson v. Atkinson (a); *Glynn v. Locke* (b); *Mitf. on Plead.*, pp. 49, 50; *Story's Eq. Plead.*, s. 392; *Cochrane v. O'Brien* (c); *Lowe and Richardson v. ———* (d); *Nickolson v. Knowles* (e); *Pearson v. Cardon* (f); *Crawshay v. Thornton* (g); *Hoggart v. Cutts* (h); *Hacket v. Webb* (i); *Darcy v. Beytagh* (k); *Griffith v. Ricketts* (l); *Duggan v. Kelly* (m); *Brooke v. Hewit* (n); *Paris v. Gilham* (o); *Dungey v. Angove* (p); *Wright v. Ward* (q); *Jew v. Wood* (r); *Mitchell v. Hayne* (s); *Bowyer v. Pritchard* (t); *Glyn v. Duesbury* (u); *Bignold v. Audland* (v).

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I do not think that any reasonable doubt can be entertained in this case. The facts are very simple. Madame Dumoncel was the widow of Mr. Hobson, and some time previously to 1840 she married

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(a) 3 Anst. 798.

(b) 5 Ir. Eq. Rep. 61.

(c) 8 Ir. Eq. Rep. 241.

(d) 3 Mad. 277.

(e) 5 Mad. 47.

(f) 4 Sim. 218; S. C. 2 Russ. & M. 606.

(g) 2 M. & Cr. 1.

(h) Cr. & Ph. 204.

(i) Cas. temp. Finch, 257.

(k) Fl. & Kel. 481.

(l) 3 Hare, 476.

(m) 10 Ir. Eq. Rep. 295.

(n) 2 Ves. jun. 253.

(o) Coop. 56.

(p) 2 Ves. jun. 312.

(q) 4 Russ. 220.

(r) Cr. & Ph. 185.

(s) 2 Sim. & St. 63.

(t) 11 Pr. 103.

(u) 11 Sim. 139.

(v) 11 Sim. 23.

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Mr. Dumoncel. On the 14th of January 1840, a deed of separation was executed between Mr. Dumoncel of the first part, Mrs. Dumoncel of the second part, and the plaintiff as their trustee of the third part.

The deed recited that a marriage had been duly had and solemnised between them according to the rites and ceremonies of the Church of England. It further recited the property to which the lady was entitled as the widow of Mr. Hobson, and an agreement that Mr. Dumoncel and she should live separate and apart, and that he should have £333 a-year, and be freed and discharged from all her debts and liabilities;—and the husband and wife—the former being seised and possessed of the property in right of his wife—joined in assigning it to the plaintiff in trust in the first place to pay the annuity to Mr. Dumoncel, and then upon trust to pay any debt created by the wife which the husband could be compelled to pay, and then to pay the residue to the wife to her separate use. There is an express covenant by the plaintiff with Mr. Dumoncel to pay the annuity of £333 out of the property.

It further appears by the bill that the lady, subsequently to the execution of the deed, took the opinions of a Jersey and a Belgian lawyer, who both informed her that the marriage was null and void. She caused these opinions to be shown to the plaintiff, and required him in future to pay her the whole of the produce of the property, or, in other words, to cease to pay the annuity of £333 to Mr. Dumoncel. Acting on that notice the trustee took the opinion of Counsel, and according to the advice which he received he did not pay the annuity, but lodged the amount in the Bank of Ireland. Mr. Dumoncel thereupon brought an action against the plaintiff on the covenant in the separation deed, and this bill has been filed against the husband and wife, calling on them to interplead, and praying for an injunction to restrain the husband from proceeding in the action at law; and the question which arises on this demurrer is, whether upon those facts this is a proper case for interpleader?

The ordinary case of interpleader is well understood, and is thus

stated by Lord Redesdale (a):—"Where two or more persons claim the same thing by different or separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them."

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One of the leading cases on the subject is the case of *Dungray v. Angove* (b), before Lord Roslyn. In that case a tenant was served with notice by a person who had brought an ejectment claiming the reversion, not under the landlord, but by adverse title, and the question was, whether upon that state of facts a bill of interpleader would lie? The landlord claimed the rent under the lease; the adverse party claimed by title paramount. It was decided that the case was not a proper one for interpleader. Lord Roslyn said (p. 310):—"The reason is manifest, for upon the definition of the bill of interpleader, it is where two persons claim of a third the same debt or the same duty."

He then proceeds to show that it is not the same debt or the same duty which was claimed by the two parties, the one claiming the land by title paramount, the other party claiming the rent reserved by the lease. He then states, in a subsequent part of his judgment, one of the cases in which a tenant may file a bill of interpleader, *ex. gr.*, where after a lease is made the lessor dies and there is a dispute between his devisee and his heir-at-law. That would be a plain case for interpleader, for both the devisee and the heir claim under the landlord the same debt, and it would not be reasonable to require the tenant at his own peril to decide who was the rightful claimant.

In the case of *Jew v. Wood* (c), Lord Cottenham held, that where there had been a memorandum in writing by a tenant acknowledging the title of one of the parties who claimed the reversion under the lessor, and a payment of rent for two years to such claimant, the tenant was at liberty to file a bill of interpleader and show that

(a) Mitf. on Plead. 48.

(b) 2 Ves. jun. 307.

(c) Cr. & Ph. 185.

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the payment and acknowledgment had been made in ignorance of the rights of the parties, and that the attornment had been by mistake or through misrepresentation. In that case there had not been such a binding contract with one of the parties in respect to the same debt or the same duty as precluded the plaintiff from calling on the parties to interplead.

In the case of *Wright v. Ward* (a), a legacy of £500 was left to two trustees for the benefit of certain persons, and there being a debt of exactly that amount which the executors had a right to claim from the obligor of a bond, an arrangement was entered into between the trustees and the executors, by which it was agreed between them that this debt should be appropriated to the discharge of the legacy. The obligor in the bond, and then his executor, for a series of years adopted that arrangement, paying the interest from time to time, not to the executors but to the *cestui que trust*, with the consent, privity and approbation both of the executors and of the trustees. This arrangement was considered by Lord Lyndhurst as in the nature of an assignment of the debt. The surviving trustee of the legacy served notice upon the obligor not to pay the money to the executors, and the executors brought an action on the bond; and Lord Lyndhurst stated, that, "Looking at such a transaction as that in the case before him, it was impossible to say that there was no ground for the trustees to file and sustain a bill against the obligor; and if they could sustain such a bill, the bill of interpleader must be allowed." In that case the same debt was claimed by both parties, and the assent of the obligor to the arrangement was not such a binding contract on him as to deprive him of the right to call on the persons who claimed the same debt to interplead.

There are some cases however, where, though the same debt or the same duty is claimed, the person liable will not be permitted to file a bill of interpleader. For example, where subsequently to the period when he might have filed a bill of interpleader he chooses to enter into a binding contract with one or other of the parties. If he does so he loses his right to call on them to interplead, and his

(a) 4 Russ. 215.

remedy must be to get rid, if he can, by some other proceeding in equity, of the contract which he has entered into with one of the parties. That is the class of cases to which *Crawshay v. Thornton* (a) belongs. Lord Cottenham in that case says:—"The case tendered by every such bill of interpleader ought to be, that the whole of the rights claimed by the defendants may be properly determined by litigation between them, and that the plaintiff is not under any liability to either of the defendants beyond that which arises from the title to the property in contest; because if the plaintiffs have come under any personal obligation independently of the question of property, so that either of the defendants may recover against them at law, without establishing a right to the property, it is obvious that no obligation between the defendants can ascertain their respective rights as against the plaintiff."

The present case differs from *Crawshay v. Thornton*. In *Crawshay v. Thornton* the plaintiffs had a right originally to call on the defendants to interplead, but lost that right by entering into a binding contract with one of them. In the present case the two defendants and the plaintiff were parties to the deed of separation, and the plaintiff has entered into an express covenant with Mr. Dumoncel to pay the annuity to him, which covenant is binding at law. There never was a right to call on the defendants to interplead in such a case. It is not the same debt or the same duty which is claimed by Mr. Dumoncel and by Mrs. Dumoncel. Mr. Dumoncel claims the annuity under the deed. Mrs. Dumoncel does not claim the annuity; but she insists that the deed is invalid, and that the plaintiff ought to pay over to her the annual proceeds of her property without deduction. That is not a case for interpleader. The one defendant claims under the deed, the other claims paramount to the deed. The plaintiff has entered into an express covenant with Mr. Dumoncel by a deed to which Mrs. Dumoncel was a party. If in a case like *Crawshay v. Thornton* a party who has a right to file a bill of interpleader loses that right by entering into a binding contract with one of the parties, how

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(a) 2 M. & Cr. 1.

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much stronger is the present case, where the plaintiff never had any right to require the defendants to interplead, but bound himself by express covenant to pay the annuity to Mr. Dumoncel? I am clearly of opinion that the plaintiff may pay the annuity to Mr. Dumoncel, unless Mrs. Dumoncel files a bill to set aside the deed. The onus lies upon her to do so, and she cannot render the plaintiff responsible if he acts in strict conformity with the provisions of the deed.

It was stated in the argument that Mr. Dumoncel is an alien, and could therefore take no benefit under the deed. If so, the plaintiff might defend himself at law. But I cannot draw that inference from the bill. It does not follow that he is an alien because he is a Belgian officer and has a foreign name. He may have been born abroad of English parents, and in that case he is not an alien. The presumption is always against the pleader, and if he has left any thing in doubt it is assumed to be in favour of the other party (a). The notice, although referred to by the bill, cannot be read on the argument of the demurrer: *Campbell v. Mackay* (b); *Griffith v. Richetts* (c); and even if he were an alien, a part of the property on which his annuity is charged is personal estate.

I am clearly of opinion that this is not a proper case for interpleader, and that the demurrer must be allowed with costs.

(a) 2 Phil. 28.

(b) 1 M. & Cr. 613.

(c) 3 Hare, 484.

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ALLEN v. HACKET.

June 14, 23.

THE bill in this cause was filed to perpetuate testimony. The replication having been filed—

After replication filed in a suit to perpetuate testimony, it is not necessary to obtain an order to examine witnesses.

Mr. *Butt*, with whom was Mr. *Exham*, moved that the plaintiff might be at liberty to examine witnesses touching the matters at issue in the cause, and especially Samuel M'Call in the pleadings named, to the end that the testimony of the witnesses so to be examined might be perpetuated, and that the plaintiff might be at liberty on all future occasions to use the testimony as he might be advised, saving all just exceptions. They cited in support of the motion 2 *Story Eq. Jur.*, sec. 1512; *Grant's Ch. Pr.* 60; *Mason v. Goonburde* (a); *Knight v. Knight* (b).

Mr. *Lane*, for the defendant, contended that the motion was unnecessary: *Ayckbourn's Chancery Practice*, p. 200; *Angell v. Angell* (c); *The Attorney-General v. Ray* (d).

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In *Smith's Chancery Practice*, p. 628, it is said:—"In the case next cited it is laid down that a bill to perpetuate testimony may be dismissed for want of prosecution any time before replication filed and examination. But the Vice-Chancellor of England refused to follow the decision, and made an order that the plaintiff should file a replication forthwith and proceed to the examination of his witnesses, as prayed by the bill, and procure such examination to be completed on or before a certain day; and in default thereof he should pay the defendant his costs of the suit, to be taxed by the

Judgment.

(a) *Cas. temp. Fin.* 391.

(b) 4 *Mad.* 1.

(c) 1 *Sim. & St.* 83.

(d) 2 *Hare*, 518.

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Master in rotation. If the plaintiff does not proceed after he has filed a replication to examine his witnesses, a similar order should be applied for." That would seem to imply that the plaintiff should go on in the regular course, and without any order for liberty to examine.

June 23.

Mr. *Exham* having renewed the motion—

The MASTER OF THE ROLLS said:—

Judgment.

I have looked into the cases and the books of practice. It is necessary to obtain an order for liberty to examine a witness *de bene esse* before replication filed. But if issue has been joined I cannot see the object of such a motion, nor can I find any authority for it. In *Howard's Exch. Prac.* p. 346, it is stated that, "if the bill be only to perpetuate testimony the plaintiff is not to pray general relief as is usual in other bills, but prays that the defendant may stand to and abide such order as the Court shall make; and also prays subpoena, and the proceedings are the same as upon other bills." The motion appears to me to be unnecessary, and I shall make—

No Rule.

COX *v.* M'NAMARA.

June 17.

A receiver who had passed his final account and paid in the balance found against him, and who had been acting for thirty years, discharged without paying the costs of his removal, or of the appointment of a new receiver.

MR. LONGFIELD moved that Henry Rose, the receiver in this cause, be discharged, and for a reference to approve of a new receiver. The receiver had been acting for thirty years and had passed his final account, and paid in the balance found due by him. In consideration of the receiver's long services, he asked that he should

not be charged with the costs consequent on his discharge, and cited *Richardson v. Ward* (a).

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Mr. *Lysaght*, for the inheritor, did not oppose the application.

The MASTER OF THE ROLLS said, that after having acted for so many years and paid in his balance, it would be hard to charge the receiver with costs. He should not give him the costs of the motion, but would not charge him with the costs of his removal and of the appointment of the new receiver, which in strictness he was bound to pay.

Judgment.

(a) 6 Mad. 266.

GARDINER v. BLESINTON.

June 17.

THE purchaser of property sold under a private Act of Parliament in this cause applied that his promissory note to the Accountant-General, payable on demand, with interest at six per cent., might be received and placed to the credit of the cause, in lieu of the three-fourths of his purchase money. Notice had been served on some, but not on all, the creditors. The solicitor for the inheritor appeared to consent, and stated that there would be a large surplus after payment of all the creditors.

The Court refused to allow a purchaser to lodge his promissory note in lieu of the three-fourths of his purchase money, upon the allegation that there would be a large surplus, and the inheritor consenting, notice not having been given to all the creditors.

Mr. *Robert R. Warren*, in support of the motion, referred to a previous order in this cause, by which leave was given to purchasers to lodge promissory notes without the consent of the creditors. He also cited *Ferguson v. Eyre* (a): *Dobbs on Judicial Sales*, pp. 21, 22.

(a) Sau. & Sc. 160.

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Rolls.
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 TON.
 ———
Judgment.

The MASTER OF THE ROLLS said he would not make an order, upon an allegation that there would be a surplus, unless all parties consented or some particular creditor agreed to take the note in payment of his demand. Much difficulty might arise in the distribution of the fund if the note was not paid.

PIERS v. PIERS.

June 22.
 ———

A sum not exceeding the interest of the purchase money, or the rents of the estate, paid to the purchaser when the money had been lodged three years, but the title was not yet completed.

THE lands of Monally had been sold under the decree in this cause to John Steele, on the 20th of May 1844; on the 14th of July 1844, he lodged £1100 the amount of the purchase money, and the sale was confirmed on the 30th of July 1844, but the title was not yet completed.

Mr. Roe, for John Steele, moved that the Accountant-General should, out of the funds the produce of the purchase money, draw in his favour for the sum of £100 generally on account of his claim as purchaser, he undertaking, in case he should be discharged from the purchase, to give credit for that sum on account of the interest of the purchase money, or out of the rents of said lands to which he should be entitled in case the title to him should be made out satisfactorily. Creditors to an amount exceeding the purchase money had consented to the motion, and the sum to which the purchaser would be entitled either as rent or interest exceeded £100.

The MASTER OF THE ROLLS.

Judgment.

This is a singular motion, but the purchaser is entitled either to the rents or the interest of his purchase money. I shall therefore make the order, as the motion is not opposed, the purchaser undertaking to abide such order as the Court may hereafter make as to repaying the sum, should the Court so direct.

Rolls Motion Book, 251, fol. 325, 1847.

1847.

Rolls.

BANNANTYNE v. BANNANTYNE.

April 30.
May 3.

ALEXANDER BANNANTYNE was examined in chief in this cause on behalf of the plaintiff. The defendant did not cross-examine him. After a decree was pronounced in the cause, the same witness was examined on behalf of the defendant in aid of the inquiry before the Master, before a commissioner extraordinary for the examination of witnesses at Glasgow, no order having been obtained giving permission to examine him.

The rule that a witness who had been examined in chief cannot be examined in aid without the leave of the Court applies only to an examination by the same party. Therefore where a witness who had been examined in chief by the plaintiff and not cross-examined was examined in aid by the defendant without an order; the Court refused to suppress the depositions.

Argument.

Mr. *Hughes*, for the plaintiff, moved that the depositions might be suppressed. He contended that the rule was general, that a witness who had been examined in chief could not be examined before the Master without the leave of the Court. That though the rule was confined in 2 *Dan. Ch. Pr.* p. 1140, followed by other text-writers, to an examination by the same party who had examined the witness in chief, the qualification was not warranted by the authorities cited in support of it. That the cases of *Metford v. Peters* (a), *Whitaker v. Wright* (b), followed the rule as laid down in the text-books, and were therefore wrong. He relied on *Birch v. Walker* (c), *England v. Downs* (d) and *Pascal v. Scott* (e).

Mr. *J. D. Fitzgerald*, against the application, cited *Metford v. Peters* (f), *Whitaker v. Wright* (g), *Pearson v. Rowland* (h), and contended that the reason of the rule which was to prevent a party from adding to or converting the witnesses' evidence, or a further examination after he had seen the depositions, applied only

(a) 8 Sim. 631.

(c) 2 Sch. & Lef. 518.

(e) 1 Phil. 110.

(g) 2 Hare, 323.

(b) 2 Hare, 323.

(d) 6 Beav. 281.

(f) 8 Sim. 631.

(h) 2 Swanst. 265.

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where the same party had examined the witness in chief. The defendant in this case had not even cross-examined the witness in chief.

Mr. *S. B. Miller*, in reply, cited *Smith v. Graham* (a).

May 3.
Judgment.

THE MASTER OF THE ROLLS.

A motion was made in this cause on behalf of the plaintiff, that the depositions of Alexander Bannatyne, who was examined in aid of the inquiry before the Master on the part of the defendant without the leave of the Court, might be suppressed, the witness having been examined in chief on behalf of the plaintiff.

The general rule on this subject is laid down by Lord Redesdale in *Birch v. Walker* (b), in which case it was decided that a witness examined in chief is not to be examined again to the account without special order, and the interrogatories being settled by a Master, to prevent his being examined to the same matter to which he was examined in chief. That case is in conformity with the authorities in England, many of which are collected in a note to *Smith v. Graham* (c).

In 2 *Smith's Chancery Practice*, pp. 154, 155, the rule however is laid down with this qualification, "that a witness examined in the cause in chief cannot be re-examined by the same party before the Master without the leave of the Court, and without the interrogatories being settled by the Master." So also, in *Daniel's Chancery Practice* (d), it is stated that "a witness who has been examined on behalf of one party may be examined by the other side after decree without an order."

The Vice-Chancellor of England, in *Metford v. Peters* (e), says: "My impression is, that the rule only is, that a witness who has been examined on one side, before the hearing, cannot be examined on the *same* side, after the hearing, without a special order for that

(a) 2 Swanst. 254.

(b) 2 Sch. & Lef. 518.

(c) 2 Swanst. 265.

(d) 2 Dan. Ch. Prac. 1140.

(e) 8 Sim. 631.

purpose." And he refers to the reasoning of Sir John Leach in *Rowley v. Adams* in support of his opinion. Sir James Wigram, in *Whitaker v. Wright* (a), cites the case of *Metford v. Peters*, and recognises the rule as laid down by Sir Launcelot Shadwell; he says:—"The rule which prohibits the re-examination of a witness after decree to the same matter to which he was examined before the decree does not apply where the witness is called after the hearing, not by the party who examined him before the hearing, but by the opposite party."

The case of *England v. Downs* (b), cited in support of this application, is really against it. In that case a witness had been examined in the cause by the plaintiff, and cross-examined by the defendant; but the points to which he was cross-examined by the defendant did not arise out of his examination in chief. Two affidavits of the witness were offered in evidence for the defendant before the Master, and rejected by him as no order had been obtained. Lord Langdale, in giving judgment, said:—"The defendant says that this witness had not been examined on his side, and that he was merely cross-examined. This, however, was not a cross-examination upon the matters to which the plaintiff had examined the witnesses, but was a direct examination in chief, though under interrogatories which were nominally cross-interrogatories. It was a direct examination in chief of this witness by the defendant to establish his own case as alleged by the answer; and that being so, I am of opinion, according to the ordinary rules and practice of the Court, not that the witness was excluded, but that the Master was not at liberty to examine this witness or to receive his further evidence without the leave of the Court." The case of *Metford v. Peters* was cited, and Lord Langdale did not say that the rule was not correctly laid down in that case.

The present case presents no such difficulty as arose in *England v. Downs*, because the witness was not cross-examined at all. It was suggested in the course of the argument that if the rule was thus established, the defendant would reserve his cross-examination until

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(a) 2 Hare, 323.

(b) 6 Beav. 281.

1847.
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 —
Judgment.

the cause came before the Master. He could not however do so; for if he examined the witness in aid, he could not put a leading interrogatory to him, nor could he put a question to discredit his testimony. If the rule was otherwise than I have stated, the plaintiff or defendant might prevent his adversary from examining before the Master the principal witness in support of his case without the leave of the Court, and without the interrogatories being settled by the Master, by examining him to some immaterial interrogatories in chief.

In *Pearson v. Rowland* (a) Lord Macclesfield says:—"But in this case it might be very inconvenient to establish such a rule as the plaintiff desires: one party might by that means trick the other out of his evidence by asking his most material witnesses two or three immaterial questions, where he finds him not fully provided to examine them, and then telling him, you must examine them now or never."

With respect to the case of *Pascal v. Scott* (b), it does not apply. In that case Elizabeth Scott was the sole plaintiff in the original cause, but only one of several defendants in the cross cause; and she examined several witnesses in the original cause, in which publication was passed on the 20th of December 1841. The plaintiffs in the cross cause examined witnesses in that cause subsequently to the 20th of December, and a motion was made by Elizabeth Scott that certain depositions of these witnesses which related principally, but not exclusively, to matter in issue in the original cause, might be suppressed, which was ordered accordingly.

The case came before Lord Lyndhurst on appeal. He says (p. 114):—"It was said that there are other defendants in the cross cause besides E. Scott, by whom alone the application for the suppression of the depositions had been made, and that the plaintiff ought to be allowed to read these depositions against such other parties. I am of opinion, however, that these depositions, having been irregularly taken, ought to be suppressed altogether, and that if any inconvenience should thence arise to the plaintiffs

(a) 2 Swanst. 266.

(b) 1 Phil. 110.

in proceeding, it should be made the subject of a special application."

The witnesses examined were not the same witnesses, and I may observe that the decision is founded on a rule which has no application to examination in aid. If the case did apply, it would go to the extent that the defendant not only could not examine the witness previously examined in chief, but no witness at all to any matter which had been examined to in chief. That would be directly opposed to *Smith v. Althus* (a), where Lord Eldon observes that "As to the examination before the Master of those witnesses who were examined in the cause, there must be an application for leave to examine them; but as to persons who were not witnesses in the cause, they may be examined before the Master on the same points." There are several cases to the same effect collected in a note to *Smith v. Althus*.

The reason given by Lord Eldon is, that the Court, by directing the reference to the Master, requires further information, and thereby justifies the examination of other witnesses to the same matters. It would appear, however, from the case in 1 *Phil.* that that rule has no application to an examination in an original and cross cause.

I shall act on the rule as laid down by Lord Langdale, Sir Launcelot Shadwell and Sir James Wigram, and refuse this motion with costs.

(a) 11 Ves. 565.

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Rolls.

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—
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MOORE v. THE MARQUIS OF DONEGAL.

STEWART v. SAME, and other causes.

July 5, 21.

Lord D. was tenant for life of certain estates, subject to a charge on the inheritance of £15,000 vested in S.

A bill was filed by Lord D.'s creditors claiming under a deed of the 20th of April 1799, and a receiver was appointed over the life estate of Lord D.

S. filed a bill to raise the charge of £15,000 vested in him, which was created by a settlement of the 12th of November 1761.

Lord D., the tenant for life, died on the 5th of October 1844; and S. obtained an order on the 27th of January 1845, from the late Master of the Rolls, that the receiver should be extended to S.'s cause so far as related to the rents due at the time of the decease of Lord D. and then remaining uncollected; a sum being in the receiver's hands consisting of rents due in Lord D.'s lifetime, part of which was collected before and part after the order of the 27th of January 1845.

Held (affirming the Master's allocation report), that the creditors of Lord D.'s life estate were entitled to the rents received before, and S. to the rents after, the order of the 27th of January 1845.

GEORGE AUGUSTUS MARQUIS OF DONEGAL was tenant for life of his estates, under a settlement of the 19th of May 1792, subject to a charge of £15,000 on the inheritance, created by a settlement of the 12th of November 1761.

On the 20th of April 1799 his lordship conveyed his life estate to trustees for ninety-nine years in trust, after payment of a maintenance to him, to create a fund for payment of his debts. The bill in the first cause was filed to have the benefit of that deed, and by a decree of the House of Lords, of the 30th of November 1835, it was ordered that the plaintiffs should be paid the amount of their several debts, and that Samuel Vesey, who had already been appointed receiver, should be continued.

The bill in the fourth cause (*Stewart v. Lord Donegal*) was filed by the assignee of the charge of £15,000, created by the settlement of 1761. George Augustus Marquis of Donegal died on the 5th of October 1844. On the 27th of January 1845 an order was made that the receiver should be extended to the fourth cause as far as related to the rents due at the time of the decease of the said Marquis of Donegal, then remaining uncollected, such order to be however without prejudice to the rights of the parties, either to the rents then collected and in the hands of said receiver, or to the rents to be collected; and it was further ordered that the plaintiff in the fourth cause should have due notice of any application to draw out said funds. A decree was pronounced in the

fourth cause on the 25th of June 1845 (a), declaring the plaintiff entitled to the charge of £15,000.

On the 15th of February 1847, the sum of £2055. 19s. 9d. stock, and some dividends being in Court to the credit of these causes and matter, an order was made referring it to the Master to enquire and report what portion of the said sum was actually received by the receiver previous to the order bearing date the 27th of January 1845, extending said receiver to the cause of *Stewart and others v. Houlditch and others*, and the portion thereof received by said receiver subsequent to the date of said order; and it was further ordered that the Master do also enquire and report who were the parties entitled to receive said sum, and in what proportions.

The Master made his report, by which he found that of the said sum of £2055. 19s. 9d. stock, the sum of £1495. 16s. 4d. equivalent to the sum of £1451. 8s. 10d. was actually received by the said receiver previous to the said order of the 27th day of January 1845, and the sum of £560. 3s. 5d. subsequent to the said 27th day of January 1847; and he found that the plaintiff in the first cause and the several reported creditors named therein were the parties entitled to receive the sum of £1495. 16s. 4d. stock; and in the second schedule to the report annexed he set forth the proportions in which the said plaintiff in said first cause and the several reported creditors particularly named therein were entitled to said fund.

The plaintiff in the first cause objected to the report, on the ground that the Master should have found that the plaintiff in the first cause and the several reported creditors named therein were entitled to the sum of £563. 3s. 5d. as well as the sum of £1495. 16s. 4d., and that the Master should have allocated the said sum of £563. 3s. 5d. to and among the plaintiff in the first cause and the several reported creditors named therein, according to their respective rights.

Mr. *Martley* and Mr. *Hughes*, for the plaintiff in the first cause, and in support of the objections.

(a) See the case reported *ante*, vol. 8, p. 621.

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Argument.

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Mr. Serjeant *Warren* and Mr. *Dix*, for the plaintiff in the fourth cause, *contra*.

The following cases were cited: *Rule v. Henry* (a); *Coleman v. Mason* (b); *Lord Sligo v. O'Malley* (c); *Boyd v. Burke* (d); *Abbot v. Stratton* (e), since published; *Morrogh v. Hoare* (f); *Thomas v. Bradstock* (g).

July 21.
Judgment.

The MASTER OF THE ROLLS.

This case came before the Court on objections to the Master's report. The facts of the case, so far as they are material to the question before the Court, were these:—Houlditch was a creditor on the life estate of the late Marquis of Donegal, and a receiver was appointed over that life estate. I do not know when the receiver was appointed; but I believe it was several years ago. He was appointed in the cause of *Houlditch v. Lord Donegal*. It appears in the cause of *Stewart v. Houlditch, Lord Donegal and others*, that by a family settlement of 1761 a charge of £15,000 on the estate of the Donegal family was created and secured by a trust term, and that charge is now vested in Mr. Stewart, the plaintiff in the fourth cause. The bill in the fourth cause was filed for the purpose of raising that charge.

The late Marquis of Donegal died on the 5th of October 1844, and on his death the rights of his creditors on his life estate were at an end, except so far as the receiver might collect the arrears due in his lifetime.

On the 27th of January 1845, an application was made to the late Master of the Rolls in the fourth cause of *Stewart v. Houlditch, Lord Donegal and others*, to extend the receiver to the fourth cause, and the following order was made.—[His Honor read the order.]

An order was afterwards made by me on the 15th of February 1847, referring it to the Master “to enquire and report what portion of the sum of £2055. 19s. 9d., Government £3½ per cent. stock,

(a) Fl. & Kel. 97.

(b) 4 Ir. Eq. Rep. 421.

(c) 3 Ir. Eq. Rep. 527; S. C. 1 Fl. & K. 300.

(d) 8 Ir. Eq. Rep. 660.

(e) 9 Ir. Eq. Rep. 233.

(f) 5 Ir. Eq. Rep. 195.

(g) 4 Russ. 64.

now standing in the Bank of Ireland to the credit of the first and second causes, and lodged by Samuel Vesey, Esq., the receiver in these causes, was actually received by said receiver previous to the order bearing date the 27th of January 1845, extending said receiver to the fourth cause of *Stewart and others v. Houlditch and others*, and the portion thereof received by said receiver subsequent to the date of said order ;” and it was further ordered that “the said Master do also enquire and report who are the parties entitled to receive said sum, and in what proportions,” and the Court reserved further order until the return of the said Master’s report. The Master has made his report under that order, and has found that “of the said sum of £2055. 19s. 9d., &c., the sum of £1495. 16s. 4d. cash was actually received by the said receiver previous to the said order of the 27th of January 1845, and the sum of £560. 3s. 5d., subsequent to the said 27th day of January 1845,” and he found “that the plaintiff in the first cause and the several reported creditors named therein are now entitled to receive the sum of £1495. 16s. 4d., stock,” and in the second schedule to the report he has set forth the proportions in which the plaintiff in the first cause and the several creditors were entitled to the fund, and he found “that the said plaintiffs in the fourth cause are entitled to the residue of said stock, same being the produce of rents received by the said receiver subsequent to the said order of the 27th of January 1845.” The sum so allocated to the plaintiff in the fourth cause is the said sum of £560. 3s. 5d.

Objections have been taken to the report by the creditors on the life estate of the Marquis of Donegal, that the Master “ought to have allocated the said sum of £560. 3s. 5d. to and among the plaintiff in the first cause and the said several reported creditors particularly named therein according to their respective rights.” The point raised by those objections is, that the sum ought to have been allocated among the creditors of the late Lord, who was tenant for life, and not appropriated to Mr. Stewart the plaintiff in the fourth cause, whose charge of £15,000 is a charge on the inheritance.

On considering the case, I am of opinion that the Master’s report

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is right. According to *Boyd v. Burke* (a) and *Abbot v. Stratton* (b), it is clear that if the order of the 27th of January 1845 had been an order to appoint a receiver for the first time (supposing no receiver to have been appointed in *Houlditch v. Lord Donegal*), that order would have attached arrears uncollected in the tenants' hands, and the personal representative of the late Lord Donegal could not have successfully contended that Mr. Stewart's receiver would not have been entitled to collect the whole of the arrears in the tenants' hands, without regard to whether they were due in the late Lord Donegal's lifetime or since his death. If the rents uncollected had amounted to a greater sum than would pay off the arrears of interest which accrued on the charge of 1761, in the lifetime of the late Lord, an equity might have been raised by those having incumbrances on the life estate only, that so far as the arrears were applied to pay off the principal sum due on the charge, to that extent they ought to stand in the place of Mr. Stewart against the inheritance; but I do not understand that the sum of £560. 3s. 5d. would be more than sufficient to pay off the interest on the £15,000, and therefore that question was not argued before me.

If the receiver had been appointed in January 1845 in the fourth cause, he would have had a right to receive the arrears in the tenants' hands, and unless some such equity as I have mentioned could be worked out, those arrears would have been applicable to pay all the interest due to Mr. Stewart; and I think it is equally clear, according to the doctrine of *Abbot v. Stratton*, that if the late Lord Donegal had been living on the 27th of January 1845, and an order to extend the receiver to the fourth cause had been obtained, Mr. Stewart would, by such order, have attached all the uncollected arrears for his own benefit, he being the first incumbrancer. Sir E. Sugden says, at the close of his judgment in *Abbot v. Stratton* (c), "I must therefore hold that the plaintiff is entitled to the arrears in question; and if my construction of the Act be correct, the same rules will apply to all cases of creditors obtaining and extending receivers."

(a) 8 Ir. Eq. Rep. 560.

(b) 9 Ir. Eq. Rep. 233.

(c) 9 Ir. Eq. Rep. 248.

I am not aware that prior to the case of *Abbot v. Stratton* any doubt existed as to the doctrine laid down in that case, so far as regards a receiver in a cause. The doubt was as to the application of that doctrine to a petition matter under the Sheriffs' Act.

The only singularity in this case is, that at the time of the order of the 27th of January 1845, the late Marquis of Donegal was dead, and the order therefore is framed in an unusual manner. It extends the receiver so far as relates to the rents due at the time of the death of the late Marquis. But I am not to determine the rights of the parties differently in consequence of the form of the order. Upon the whole, I think the Master's report is right, and that the £560. 3s. 5d. ought to be applied to liquidate the arrears of interest due to Mr. Stewart. If that sum be more than sufficient to pay the arrears of interest due in the lifetime of the late Marquis, a question may arise, whether the creditors on his life estate would not be entitled to the surplus, for it would not be equitable to apply it in payment of the principal. The view which I take is, that the money should be applied to the arrear of interest due on the prior incumbrance.

The objections must be overruled.

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Judgment.

1847.
Chancery.

BALL v. BALL and CURTIS.

(*Chancery.*)

May 29.

A husband covenanted to insure his life for £1200, and assign the policy to trustees and confessed a judgment to them for that amount, to be called in if the policy was not so assigned and kept up. Another sum of £800 vested in them by the same settlement on similar trusts was lent by the trustees to the husband on the security of the assignment of a policy of insurance for £800 on his life. No other policy was assigned to them, and no steps were ever taken to enforce the judgment or covenant. In a suit against the trustees after the husband's death, *Held*, first, that

the proceeds of the policy were not necessarily to be considered as obtained in pursuance of the husband's obligation, but that the trustees might apply them for the purpose for which the policy was really assigned; and secondly, that their liability for default in not compelling the husband to insure depended on his ability.

A, having passed his bond and warrant to confess judgment thereon to trustees, was discharged as an insolvent under statute 3 G. 4, returning them for the amount in his schedule. Judgment was afterwards entered on the warrant by them, and assigned to new trustees on the old trusts, by a deed to which A was a party. *Held*, that this was in the nature of a new obligation, and that the judgment was an available security.

By a settlement executed in 1837, on the marriage of Edward Ball and the plaintiff Anne Jane, then Miss Darling, a sum of £800 secured by a bond of her father was vested in trustees for the separate use of Mrs. Ball for life, and after the deaths of her and her husband for the benefit of the children of the marriage. At the same time Edward Ball executed his bond and warrant of attorney to the trustees to secure £1200, and the trusts declared in the settlement respecting it were to permit him to enjoy the interest during his life, so long as he should pay the premiums on a policy of insurance which he covenanted to effect for the like sum, but in case of the policy not being effected or being forfeited or the premiums unpaid, the trustees were thereby directed and required to call in the £1200 secured by the bond, and to hold it in trust for Edward Ball for life, with remainder to Mrs. Ball for life, and after their deaths for the children; but it was agreed that if Edward Ball should effect and keep up a policy for £1200 on his life, then the bond should not be called in, and after his death should be cancelled and the judgment thereon be satisfied, and the trustees should hold the proceeds of the policy in trust for Mrs. Ball for life with remainder for the children of the marriage; and Edward Ball covenanted with the trustees to effect and keep up a policy of insurance on his life for £1200. The deed contained a power to

appoint new trustees. There were several children of the marriage who, at the institution of this suit, were all minors.

Towards the end of the year 1838 Edward Ball took the benefit of the then Insolvent Acts, 1 & 2 G. 4, c. 59, and 3 G. 4, c. 124. In his schedule he returned the trustees of his settlement as his creditors for the £1200.

As of Trinity Term 1839, subsequent to the discharge of Edward Ball as an insolvent, judgment was entered by the trustees on his bond, and the judgment was soon after duly assigned to the present defendants. By a deed executed at the same time and dated in September 1839, the defendants were, pursuant to the power in the settlement, appointed trustees in lieu of the former trustees. E. Ball was a party to this deed, and it declared that judgment had been entered on his bond and was assigned to the defendants on the trusts of the original settlement, and that they should be possessed of it, and act in and for and perform, execute and exercise all the trusts, intents and purposes declared in the original settlement. At the same time the judgment which had been entered on Darling's bond was assigned to the defendants:

Darling having become irregular in the payment of the interest, execution was issued on the judgment against him in December 1839; and in 1840 the £800 was recovered. It was lent by the defendants to E. Ball, who was a dealer in horses, and by him employed in his business.

Previous to the recovery of the £800 E. Ball had effected two insurances on his life for the aggregate sum of £800. When the proceeds of Darling's judgment were lent to him he assigned these two to the defendants. Mrs. Ball was a party to the assignment, and by it gave up her claim to the interest of the £800 during her husband's life, towards paying the premiums upon the insurances. This deed was obscurely worded, but the intention and the construction put upon it by the Court was that the policies of insurance should be a security for the repayment of the £800 lent to E. Ball. No other security was taken by the defendants for that sum.

In May 1844 E. Ball died, and the £800 secured by the policies was received by the defendants.

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Statement.

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Statement.

The bill in this cause was filed in 1846 by Mrs. Ball, on behalf of herself and her infant children, seeking to make the defendants as trustees responsible for the entire sum of £2000.

It was admitted that no steps had ever been taken to realise any thing by means of the judgment against E. Ball, but it was alleged on behalf of the defendants that he had been from 1839 in embarrassments and had left no assets, and therefore that no effectual steps could have been taken. It was proved that he was in the habit of borrowing from money-lenders, but lived well and had kept up an insurance for £1000 for the benefit of another creditor who lent him money for his business. It was not in evidence that he had left any available assets.

Mr. Brewster, Mr. R. Walker and Mr. J. E. Walsh, for the plaintiff.

Argument.

They argued that, the judgment against E. Ball having been entered after his insolvency and he being a party to the assignment of it to the defendants, it was a binding judgment against him, as under the then Insolvent Law there was nothing to prevent an insolvent giving a new security, and that his covenant also was not discharged: *Sweeney v. Sharp* (a); *Rea v. McCabe* (b); *Denne v. Knott* (c); *Browne v. Fleetwood* (d); that there was sufficient evidence of his being of ability to keep up an insurance for the £1200, and therefore the trustees having admittedly taken no steps to compel him to do so were liable for their wilful neglect to that amount: *Caffrey v. Darby* (e); *Hill on Trustees*, p. 455; *Lawson v. Copeland* (f); but they further contended that the defendants were, at all events, liable to two sums of £800, for their liability to the one sum which they had received from Darling was admitted, and the policies kept up by Ball being found in their hands must be taken to be applicable to the purposes for which it was their duty to make him insure his life, and they could not be heard to say they

(a) 12 Mo. 163.

(c) 7 M. & W. 143.

(e) 6 Ves. 488.

(b) Hayes, 484.

(d) 5 M. & W. 19.

(f) 2 Bro. C. C. 156.

were applicable to any other purpose: *Cocker v. Quayle* (a); *Whistler v. Newman* (b). It was also argued, on the construction of the deed assigning the policies, that it did not appear that they were not taken in pursuance of Ball's covenant in the settlement.

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Mr. Serjeant *Warren*, Mr. *Franks* and Mr. *Leech*, for the defendants.

They argued that E. Ball was discharged from all liability by his insolvency; that no action could have been sustained on his covenant; and that the bond being discharged by the insolvency the judgment on it would have been set aside on motion, if sued upon, and any proceedings taken on it defeated: *Turner v. Moffett* (c); but that even if Ball could have been sued, his embarrassed circumstances were a sufficient excuse to the trustees, and it lay on the plaintiffs to prove that proceedings against him would have been productive, and that at the utmost there should be an inquiry as to Ball's solvency. On the other view of the case they argued the plain meaning of the transaction assigning the policies was to secure the trustees the amount lent to Ball, and that there was nothing in the policy of the law which would prevent the defendants from applying the money accordingly; that the objections to it would equally apply to prevent them lending their own money on the same security; and though the loan was a breach of trust it was made good, for the £800 was now forthcoming.

The LORD CHANCELLOR.

Looking to all the facts of the case, I cannot charge the defendants as having taken these policies on the trusts of the settlement regarding the £1200. I think the transaction was what it is stated by them to have been, viz., that having got the £800 secured by Darling's bond they lent it to the husband, and being conscious at the time that in so doing they were guilty of a breach of trust they secured themselves against the consequences in two ways. They

Judgment.

(a) 1 R. & My. 535.

(b) 4 Ves. 129.

(c) Al. & N. 414.

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got, in the first place, from Mrs. Ball, her release of the interest payable to her, allowing them to apply it towards keeping up these policies. The release is worded incorrectly, as if they were still keeping the money in their hands, but that is quite contrary to the intent and object of the parties. That release is binding as far as it went; but the trustees felt perfectly conscious that it would not secure them against the children of the marriage; and so they, to guard against this second liability, took from the husband the assignment of these policies of assurance to provide a fund to meet their claims. On this part of the case, what was there in the deeds to prevent the trustees from taking this security from the husband? Of course, taking these policies did not absolve them from liability to make good the £800; but they have realised that sum by them; and though clumsy language is used in this instrument, the real truth of the transaction is apparent, that the policies were not taken as a performance of the trusts of the settlement, but to secure for the issue of the marriage the £800 lent to the husband.

But it is said I must hold any assignment of these policies to have been in performance of the trusts of the settlement. I cannot yield to that argument, and I will act on what I believe to have been the truth of the transaction. I do not think that these trustees would have been so foolish as to take the responsibility without any advantage or security in lending the money. I will therefore hold that the defendants may apply these policies to the £800 lent, and have not incurred on account of them an additional responsibility for another sum of £800. It is of course to make them liable for the one sum of £800, and under the circumstances for the costs of the suit.

There is another view of the case, which is this:—There was an obligation on the trustees to compel Ball, the husband, to keep up an insurance on his life pursuant to the settlement. Their liability under that obligation depends on many considerations. The first is, what was the state of things when they became trustees? The husband had been an insolvent; but the judgment was entered up against him and assigned to the defendants after his insolvency.

I think the defendants are estopped from denying that that judgment could be assigned and enforced. The deed recites that it had been entered, and Ball, the husband, joined in the assignment of it to the defendants. The Court would not have prevented execution being issued on that judgment, for, as the Insolvent Law then stood it did not prevent the giving of a new security for a debt due previous to the debtor's insolvency. The original bond may have been discharged by the insolvency; but the debtor became a party to the deed recognising the validity of the judgment and the assignment of it to the defendants, expressly for the trusts and purposes mentioned in the original settlement, and that they should be possessed of it, "and should act in and for, and perform, execute and exercise all the trusts, intents and purposes," declared in respect of the original trustees. One of those was to enforce the judgment for £1200, for the purposes of the settlement. The trustees took no step whatever for that purpose, and it is urged they are liable for that neglect. But on the other hand, it would seem that no step which they could have taken would have produced any thing. The husband appears to have been in the hands of money-lenders and in difficulties. It is possible however that he may have been able to meet the engagement he had made under this settlement; and if the plaintiffs think they can establish his solvency and show that he was of ability to have kept up this insurance or paid the £1200, they may have an enquiry on that subject.

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 Judgment.

The enquiry was declined.

Reg. Lib. 97, fol. 89, 1847.

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MOLLOY v. FRENCH.

June 7.

A testator, being entitled to a charge on the estate of S. and to Government stock, bequeathed, amongst other legacies, £2500 to M., and directed that the charge should be called in to pay the legacies, and that the annual interest of the charge in the meantime and the stock should be appropriated in payment of two legacies of £500, to be paid first out of the stock, and the deficiency, if any, out of the interest on the charge, and if these should prove insufficient, out of the principal. The executor having proved the charge in a suit against the estate of S., received and misapplied a great portion of it, and then executed an agreement, that £2500 of the sum reported on the charge should be paid to M., and that she should be considered the actual owner; and that sum was afterwards reported payable to her. The assets being deficient in consequence of the *devastavit*, *Held*, that the transactions between the executor and M. were not an appropriation tantamount to payment so as to give her priority over the other legatees.

ST. GEORGE FRENCH, by his will, after reciting that he was entitled to the sum of £10,153. 16s. 11d., bearing interest at £5 per cent. per annum, and secured by the several securities of Arthur French St. George therein mentioned, bequeathed to his brother, the defendant Patrick French, £3000; to his niece Mary Anne French £2500; and, after some other legacies, the will proceeded as follows:—"As the whole of the bequests are not payable till two years' notice shall have been given to the aforesaid Arthur French St. George, of calling in the total amount of the sum due by him, viz., £10,153. 16s. 11d., as above referred to, I will and direct my executors to serve him the said Arthur St. George with said notice as early as possible after my decease, to enable them to pay off the above legacies at the expiration of two years after that event, and that they appropriate the annual interest of said sum for the said two years, amounting to £253. 16s. 7d. half-yearly, as also three months' interest amounting to £126. 18s. 5d., which remains due by the said Arthur French St. George, also such Government stock and money as I may die possessed of, as follows, viz., after payment of my lawful debts, testamentary and funeral expenses, I give and bequeath to my friend Dr. H. Gregory a legacy of £500," &c., and then proceeded:—"I give and bequeath to my faithful housekeeper Frances Goulding a legacy of £500; the above two legacies are the first to be paid from such amount as I may have in Government stock after the payment of my lawful debts, funeral and testamentary expenses, and are to be paid in equal shares as nearly as possible after my death, and such amount as may remain unpaid

to be paid to them also in equal shares from each half-year's interest as above referred to. Should the above resources for payment of those two legacies prove insufficient, recourse to be had to the principal, viz., £10,153. 16s. 11d., to such extent as may be found necessary to pay them off."

St. George French died in 1838, and Doctor Gregory proved the will, and paid off several of the debts and legacies. Upon his death Patrick French obtained administration *de bonis non* with the will annexed of the testator St. George French. Patrick French afterwards proved the charge of £10,153. 16s. 11d., together with a large arrear of interest, in the suit of *Wood v. St. George*.

In 1840 the plaintiff, as assignee of the legacy of Frances Goulding, filed his bill in this Court against the defendant Patrick French, and on the 2nd of May 1842 a consent was entered into between them in that cause, whereby Patrick French agreed to pay the plaintiff £310 for all costs, and £234. 1s. 9d. in part discharge of his legacy and interest, and the residue when recovered out of the sum reported due in *Wood v. St. George*; and that in the meantime all further proceedings in the plaintiff's cause should be stayed.

By an agreement of the 12th of April 1841, and entitled in the cause of *Wood v. St. George*, Patrick French agreed with his daughter Mary Anne French that the sum of £2500, part of the sum of £10,153. 16s. 11d., reported due to him, together with all interest then due, or thereafter to grow due, on said sum of £2500, should be paid to her, and that she should in all respects be considered as the absolute owner of said sum and of all interest thereon, and that he would execute any further instrument which might be necessary for vesting absolutely in her the legal and equitable title to and property in that sum. That order was made a rule of Court; and by deed of the 31st of May 1841, Patrick French absolutely assigned the sum of £2500 to Mary Anne French, with full power to her to receive the same and give discharges therefor. The plaintiff was no party to the consent or order and had no notice of the assignment.

The Master, by his report in *Wood v. St. George*, found that the £10,153. 16s. 11d. was due to Patrick French, as administrator of

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St. George French, and that of this sum there was due to Mary Anne French in her own right under the consent and order the sum of £2500 and interest, which report was confirmed by the final decree in that cause.

Patrick French had received various sums on foot of his charge in *Wood v. St. George* between 1840 and 1845, amounting to nearly £3000, and was in embarrassed circumstances at the time of the assignment to his daughter.

On the 12th of May 1846, a motion was made in the causes of *Wood v. St. George*, *Wood v. French*, and *Molloy v. French*, that the funds which were then about to be reported due on foot of the testator's demands, *exclusive* of the sum payable to Mary Anne French, should be invested in Government stock to the credit of the three causes, on the ground that Patrick French had misapplied a considerable portion of the assets, and was in embarrassed circumstances. That motion stood over until the report, with liberty to the parties to attend in the office, and the Master reported the sum still due, of which he found £2519. 13s. 3d. due to Mary Anne French and the residue only to Patrick French. The plaintiff then moved to have the report varied, inasmuch as it would have the effect of throwing the entire deficiency by reason of the administrator's *devastavit* on the other legatees exclusive of Mary Anne French: upon that motion the entire funds were transferred to the credit of the three causes, on the terms of the plaintiff's filing the present bill to impeach the right of Mary Anne French to receive the entire of her legacy under the consent and assignment of 1841. Patrick French had assigned his legacy to Theobald Billing in 1838.

The defendant Mary Anne French, by her answer, insisted that on the true construction of the will of her uncle the legacy to her was demonstrative, payable out of the particular fund and not liable to abate until the plaintiff's legacy was exhausted; that she was a purchaser from her father, the administrator, who assigned the charge to her *bona fide* in payment of her legacy; and she relied on the orders and decree in *Wood v. St. George* as establishing her right.

Mr. *O'Brien*, Mr. *Longfield* and Mr. *P. Blake*, for the plaintiff.

They contended that the defendant Mary Anne French had no better equity as purchaser than she could have as legatee, as the legacy was only a *chose in action*: *Jennings v. Bond* (a); *Layfield v. Layfield* (b); *Gillespie v. Alexander* (c); *Hopkins v. Gowan* (d); *Sims v. Doughty* (e): that the assignment of the *chose in action* without notice did not affect the plaintiff: *Foster v. Hargreaves* (f); *Morris v. Levy* (g). They also insisted that the legacy had no priority, but that in the event of a deficiency all should abate rateably; and that the assignment to the defendant Mary Anne was intended to defeat the rights of the plaintiff and the other legatees.

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Argument.

Mr. *Christian* and Mr. *William Smith*, for the defendant Mary Anne French.

They insisted that the assignment to Mary Anne French was *bona fide* and valid; that it was an appropriation equivalent to payment; that it would have been a sufficient reduction into possession to entitle a husband to his wife's *chose in action*, which they argued was an analogous case; that there was no devastavit at the time of the assignment; and that she was entitled to retain the whole without abatement or refunding: *Anonymous* (h); *Walcot v. Hall* (i). They also cited 1 *Rop. on Leg.*, p. 339; *Heygate v. Annesley* (k); *Oglander v. Baston* (l); *Nugent v. Gifford* (m); *Squib v. Wyn* (n).

Mr. *Martley* and Mr. *Alexander Graydon*, for Theobald Billing, cited *Ex parte Chadwin* (o).

(a) 8 Ir. Eq. Rep. 755.

(c) 3 Rus. 130.

(e) 5 Ves. 243.

(g) 1 Rus. 145.

(i) Ibid. in Note.

(l) 1 Vern. 396.

(n) 1 P. Wms. 378.

(b) 7 Sim. 172.

(d) 1 Mol. 561.

(f) 1 Kee. 281.

(h) 1 P. Wms. 494.

(k) 3 Br. C. C. 363.

(m) 1 Atk. 463.

(o) 3 Lev. 380.

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Mr. *Radcliff* and Mr. *D. McCausland*, for Dorothea French, another legatee.

They cited *Digby v. Boycott* (a); *Shewell v. Shewell* (b); *Dando v. Dando* (c).

June 7.
Judgment.

THE LORD CHANCELLOR.

This is a strange case: I do not mean to dispose of it at present; but it strikes me, if what the defendant contends for can be done, very mischievous consequences would result. This is not the case of a specific chattel given by the testator and taken by the legatee, in consideration of which the legatee discharges the executor from the legacy. But a deed was drawn to give priority to the legatee, in preference to other legatees, without any consideration beyond what appears on the face of the deed. I feel great difficulty in saying that this can be done. It would amount to this, that a party might sit down and draw a new will for the testator, giving legacies in different order and degrees from what the testator did. This must be the effect of such an act. It has been ingeniously argued that this is only an appropriation. I do not see how. It gives the legatee a right to be paid out of this fund; that right she had before, and does not appear to have acted on it. I cannot discover what difference this made. I cannot see how it gives her a priority which she had not by the will.

I do not know of any case similar to this. If an executor has sufficient funds he may pay one legatee before another; or perhaps, instead of paying money, he may give a specific chattel, for example, a house; but that is not this case. There is an old case somewhat like this reported in *Chancery Cases*—*Grove v. Banson* (d). There the plaintiff's grandfather gave him £5000, and his sister, afterwards Banson's wife, £500, making his son, the defendant Grove, his executor, who, with part of the money, bought a freehold estate which he mortgaged, retaining the equity of redemption. On the marriage of Banson to the daughter of the defendant Grove, he

(a) 4 Hare, 444.

(c) 1 Sim. 510.

(b) 2 Hare, 154.

(d) 1 Chan. Ca. 148.

agreed her portion to be, for legacy, interest and what more he would give her, £1000, and entered into a statute to Banson for the same, and then granted him the equity of redemption and reversion as a further security. Plaintiff filed his bill to be admitted to redeem the mortgage and to have the legatees lose in proportion; and it was held that, as the legacy was not paid but only secured, it was equitable that each legatee should lose in proportion, there not being enough to pay all. In another case, *Nelthrop v. Briscoe* (a), in the same book, *Grove v. Banson* is thus referred to:—"As to that case, there was not any payment, but a security, and by that means he would have a redemption; so this payment was not paid but executory; and the plaintiff cited the case of *Picks v. Vincner*, which was in substance this, that an executor may not pay one if he hath not enough to pay all; and an executor is not bound to pay a legacy without security to refund." That case was not exactly this, but it bears out the proposition. An executor having assets sufficient may pay a legacy, but he cannot otherwise deal with the assets so as to give the legatee such a right as will prevent him being obliged to refund. I will, however, look into the authorities.

As to the purchase, I think Miss French has no right beyond that of the other legatees, and the transaction cannot give her a prior claim, as an assignee of a legacy cannot be in a better position than the legatee. There is, however, another question remaining behind, namely, are the legatees to be affected by the executor's subsequent *devastavit*? The difficulty in that is, that the assignees are sought to be affected by an equity founded on matters occurring subsequently. As a general proposition, an assignee of a *chose in action* is bound by all the equities which attached to it at the time of the assignment; that is quite clear; but there are other circumstances in this case to carry it further, and which will raise the question suggested in the argument respecting the *bona fides* of the assignment by the executor. In any decree which I shall make, I shall not prejudge that question. My present impression is, that there is no priority.

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(a) 1 Chan. Ca. 137.

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 June 8.
Judgment.

THE LORD CHANCELLOR.

I have considered this case, and am of the same opinion I expressed yesterday. The transaction was a prudent one as between the lady and her father, that he should be prevented from dealing with the fund; but it had no effect as between her and the other legatees. There was no appropriation of any part of the fund. There was no specific security. Without referring to other objections, there was no appropriation within the meaning of the authorities. The case in *Chancery Cases* (a) is the nearest to this. Appropriation in the sense there used is something equivalent to payment. Therefore I am clearly of opinion that this was not binding on the other legatees. It was also made *pendente lite*, and is objectionable on the ground that it was a dealing with the assets after a suit was instituted, for the suit was capable of being brought into active operation at the time. This would be an additional ground for my decision, that this bill is sustainable. Whether the parties can be made accountable for the *devastavit* is another matter. It may make a difference whether the *devastavit* was only of the fund applicable to this one legacy. That, however, is not yet ripe for decision. There must be a decree to account.

Reg. Lib. 97, fol. 128, 1847.

(a) *Supra*, p. 380.

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Chancery.

KELLY v. MAGEE and others.

June 9.

FRANCIS BURLEIGH, being seised of a house and premises in Dublin for lives renewable for ever, under a lease of 1774, at a rent of £30 Irish currency, confessed a judgment to the plaintiff in Trinity Term 1824 for £335. 18s. 5d. The plaintiff in 1824 sued out an elegit and entered into possession of a moiety of the rents and profits of the premises, which he continued to receive up to September 1830. At this period the *cestui que vies* were all dead, but the lessor being a minor no renewal was obtained in Burleigh's lifetime. He died in 1832; and in that year, in consequence of the non-payment of the rent, an ejectment was brought and an habere issued, but previous to its execution the landlord, by a deed of January 1833, renewed to the defendant Edward Magee, the executor named in the will of Burleigh.

In April 1833 Magee demised to the defendant Storey, for lives renewable for ever, at a rent of £50, for which Storey paid a fine of £120; and in October 1835 Storey mortgaged his interest in the premises to the defendants Richard and Joseph Watkins. On the 30th of December 1844 the Watkinses re-conveyed to Storey, who, on the following day, conveyed his interest absolutely to the defendants Watkinses in consideration of £300 and an annuity of £30 to Storey for his life. The plaintiff's judgment was redocketed in 1832.

The bill in this cause was filed in 1844, to raise the amount due on foot of the judgment out of the premises; and the amended bill, filed in 1845, charged that the deed of January 1833, made to Magee, recited the covenant for perpetual renewal in the original lease; that at the time Magee demised to Storey, the latter had full notice that the lease to Magee was a renewal of the former lease, having obtained a copy of the renewal from Magee, and that the Watkinses had full knowledge of the plaintiff's rights and the nature

A bill by a judgment creditor to have the benefit of a renewal to A, and set aside a sub-lease to B, who sold to the defendant X, stated circumstances of express notice to A and B. The bill was taken as confessed against A and B. The defendant X denied notice to them, and it was not proved. *Held*, that there could not be a decree against him.

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of Magee's and Storey's title previous to the conveyance to them in 1844, the original bill having been then filed and cautionary notices served on Nixon the undertenant, to whom, as mortgagees in possession, they had let the premises; and that they had purchased during the pendency of the suit. The bill prayed that the lease of January 1833 might be declared to have been obtained by Magee pursuant to the covenant for renewal in the original lease, and as a trustee for the parties claiming under Burleigh; and that the lease to Storey in April 1833 and the conveyance by him to the Watkinses in 1844 might be declared fraudulent and void against Burleigh's creditors.

The Watkinses by their answer denied that they had any knowledge or notice of the plaintiff's claims or of the original lease of 1774 or the lease to Magee, until they were served with the subpoena to answer the bill in 1845, or that the lease to Magee was in pursuance of or recited the covenant for perpetual renewal in the original lease. They further stated that Storey was indebted to them in October 1844 on an account stated to the amount of £300, and having no other security or means of payment than these premises, of which they found he had a lease for lives renewable for ever from Magee for which he had paid a fine of £120, they reconveyed the premises (the conditions of the mortgage having been fulfilled), and the next day took an absolute assignment, without getting any abstract of title, in discharge of Storey's debt, and had since continued to pay him the annuity of £30. And they insisted that even if Magee's interest was bound by the plaintiff's judgment, yet that Storey purchased without any notice of the original lease, and that neither he or the Watkinses were affected by the judgment.

Magee and Storey suffered the bill to be taken *pro confesso* against them. The plaintiffs examined several witnesses, but failed to prove that either Storey or the Watkinses had any notice of the covenant in the original lease.

Argument.

Mr. *Hughes*, Mr. *Maley* and Mr. *Miller*, for the plaintiff, contended that, even supposing the evidence was not sufficient to satisfy the Court that the Watkinses had notice of the title of Magee and

of the claims of the plaintiff through Nixon, yet that the bill being now taken *pro confesso* against Storey he must be held to have full notice, and that the plaintiff's judgment affected his interest, and therefore that of the Watkinses, who purchased *pendente lite*.

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Argument.

Mr. Brewster, Mr. J. D. Fitzgerald and Mr. Joseph Deane, for the defendants Watkinses.

THE LORD CHANCELLOR.

This is a clear case as against Storey and Magee. The only difficulty is in relation to the Watkinses. I do not think the case is affected by *lis pendens* or within the late statute. But having released the debt due by Storey, they had a right to fall back on this case, that Storey had no notice of the plaintiff's claim. The Watkinses must have the benefit of that. There is some novelty in the case, for I cannot make use of a decree *pro confesso*, or of an answer by one defendant against another. The parties have not examined Storey, and I cannot bind the Watkinses with any notice given to Storey, which is not proved. The Watkinses subsequently put the plaintiffs upon proof of notice with reference to the particular matters, but no proof was made. They stand simply on the deed to Storey not referring to any right. I am disposed to say that the suit has totally failed as against the Watkinses, and I shall dismiss the bill with costs as against them. I shall mention the case again to-morrow.

June 9.
Judgment.

THE LORD CHANCELLOR.

I have re-considered this case, and I continue of the same opinion which I expressed yesterday.

June 10.

Reg. Lib. 97, fol. 139, 1847.

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Chancery.

JOHNSON v. BRADY.

June. 14.

A testator devised to his wife his lands; by a separate clause he gave her certain chattels and then added; "fourthly, I order my wife to pay the following legacies," which he enumerated. He made her and another executors. *Held*, the legacies were charged on the lands, and the wife took the fee.

Neither the word "thereout" or "paying" is required to make the payment of a legacy a condition so as to give the devisee the fee in lands charged with it.

The costs of a suit in the nature of an ejectment bill to recover devised property on a certain construction of a will, though doubtful, are not within the rule in administration suits, that they come out of the estate.

NICHOLAS FARRELL, being seised in *quasi* fee of certain houses and premises and of personal estate, by his will dated in 1801 made amongst other dispositions the following:—"First, I order all my lawful debts to be paid; secondly, I bequeath to my well beloved wife Elizabeth Farrell, otherwise Clinton, my dwelling-house and furniture, my shop and all the goods of every kind therein, containing my tan-yard with my stock of leather therein; the house in which Thomas Babbington lives; the tenement formerly belonging to Mrs. Lane; all my lands and tenements real and personal, excepting four acres which my son Nicholas Farrell is to enjoy during the term in Kilnavara, he paying for the same £2. 10s., by the acre if he chooses to keep it; thirdly, I also bequeath to my wife all my cows, horses, carriages and farming utensils, with the crop of every kind; fourthly, I order my wife Elizabeth Farrell to pay the following legacies, viz., fifthly, I bequeath to my son John Farrell the sum of £50, also the house in Lurganboy during the term, he paying the ground rent, the said £50 to be paid in six months after my decease. I nominate, constitute and appoint my wife Elizabeth Farrell and Patrick Walsh sole executors of this my last will and testament."

N. Farrell died shortly afterwards, whereupon his widow proved the will and entered into possession of the property, and so continued till the time of her death. She devised the lands in fee to the defendant J. Brady, against whom the bill was filed; the plaintiff claiming as the representative of J. H. Cottingham, who had purchased from the heir-at-law of Nicholas Farrell. The bill sought to recover the real estates, and to have certain renewals declared grafts for the benefit of the plaintiff.

The *Attorney-General* (Moore), Mr. John Brooke and Mr. Ormsby for the plaintiff.

If the will had stopped at the second clause, there would be no doubt that Mrs. Brady took only a life estate; does the direction to her to pay the legacies enlarge that estate? The cases of giving the fee by implication are all reducible to two classes; first, where there is an express direction to the devisee to pay out of the thing devised in express terms; secondly, where there is no specific direction to pay out of the thing devised, but the payment is identified with the clause devising. This case comes within neither. The clauses devising and that directing payment are distinct, and a clause is interposed between them. In *Doe v. Snelling* (a), the clauses were considered as being one, and the direction was to pay *thereout*. In *Dolton v. Hewer* (b), though the word "thereout" did not occur, the charge was in the same clause as the devise. *Doe v. Phillips* (c); *Doe v. Holmes* (d). Unless the direction to pay is necessarily connected with the devise, the result of the cases is that the fee will not pass to the disheirson of the heir-at-law. *Doe d. Wright v. Child* (e); *Hopewell v. Achland* (f); *Right v. Compton* (g); *Fenny v. Ewestace* (h); *Ansley v. Chapham* (i); *Paice v. Archbishop of Canterbury* (k).

On the grammatical construction the legacies are to be paid out of the personalty.

Mr. Serjeant *Warren*, Mr. *Gayer*, and Mr. *William Dwyer*, for the defendant.

The present case comes within a third class; namely, where on the whole construction of the will, the testator obviously intended that the devisee should pay the charges personally: *Doe v. Snelling* (l); *Moone v. Heaseman* (m). Every devise must be taken to be for the benefit of the devisee, which would not be the result if the

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Chancery.
JOHNSON
v.
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Argument.

(a) 5 East, 87.

(c) 3 Bar. & Ad. 753.

(e) 1 Bos. & Pul. N. R. 335.

(g) 9 East, 267.

(i) Cro. Car. 157.

(l) 5 East, 87.

(b) 6 Mad. 9.

(d) 8 T. R. 1.

(f) Salk. 239.

(h) 4 M. & S. 58.

(k) 14 Ves. 364.

(m) Willes, 440.

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devisee in a case like the present were only to take a life estate : *Reed v. Hatton* (a) ; *Collier's case* (b) ; *Goodtitle v. Maddern* (c). As the devisee must abide by the whole will or reject it altogether, it makes no difference on principle whether she is expressly to pay out of the devise or not : *Talbot v. Radnor* (d). The direction cannot be to the widow as executrix, as there is also an executor. They also cited *Baddeley v. Leapingwell* (e) ; *Hogan v. Jackson* (f) ; 2 *Jar. Wills*, 172, *et seq.*

THE LORD CHANCELLOR.

June 14.
Judgment.

Properly speaking, the question in this case is one for a Court of Law, and if I had any doubt upon the true construction of the will I should send a case upon it to a Court of Law ; but I have no such doubt. The sole question is, whether upon the construction of the will of Nicholas Farrell, his widow Mrs. Elizabeth Farrell took an estate for life or in *quasi* fee in certain lands held by the testator for lives renewable for ever ? By his will the testator, after first ordering all his debts to be paid, bequeathed to her amongst other property all his lands and tenements real and personal, excepting four acres of land which his son Nicholas Farrell was to enjoy during the term, he paying for the same £2. 10s. by the acre if he chooses to keep it. The will then proceeds as follows :—" Thirdly, I also bequeath to my wife all my cows, horses, carriages and farming utensils, with the crop of every kind ; fourthly, I order my wife Elizabeth Farrell to pay the following legacies, viz. :—fifthly, I bequeath to my son John Farrell the sum of £50, also the lands in Lurganboy during the term, he paying the ground rent, the said £50 to be paid in six months after my decease. I nominate, constitute and appoint my said wife and Patrick Walsh sole executors of this my last will and testament." The question is, whether the widow was bound to pay these legacies out of the personal property bequeathed by the third clause, or whether they are charged on all

(a) 2 Mod. 25.
 (c) 4 East, 496.
 (e) 3 Bur. 1542.

(b) 6 Co. 16.
 (d) 3 My. & Ke. 262.
 (f) Cowp. 299.

the property real as well as personal left to her by the will? The fourth clause, which immediately follows the bequest of the particular personal property, is but a personal direction to her to pay the legacies, and the question is, out of what class of property they are to be paid, and in what capacity she is to pay them? Now, it is to be observed that she was not the sole executor appointed by the will; and I take it that the direction is an order on her to pay these legacies, not as executrix, but as the devisee of her husband, incorporating with the devise a direction that she shall pay them out of whatever property she took. The personal property, however, might be ample, or it might not; the chattels might be insufficient; what she is to hand over to Nicholas Farrell she takes as a legacy; so as to the cows, horses, &c., bequeathed by the third clause. There is nothing in the will to confine this direction to be one to pay these legacies out of any particular portion of the properties left by the will, and the case is therefore entirely different from the authorities that have been cited. It is different from the case in *Salkeld—Hopewell v. Ackland* (a)—where the condition was attached to the particular property. It is said that, in some of the cases the word “thereout” occurred, and that the condition should be established by the phrase “he or she paying,” or some such words. If I were satisfied that the rule of law was that the expression “thereout” or “paying,” as it has been put by the *Attorney-General*, were absolutely necessary to create the condition, my opinion would be different; but I have never understood the rule to be, that it was limited to those two cases. I must look at the whole will for the purpose of construction, and if from the whole it will appear that the intention of the testator was that the devisee should pay the legacies out of the estate as part of the terms on which he is to take that estate, it is a condition. This is expressly decided. The case of *Reeves v. Gower* (b) is almost word for word with the present; there A, by his will, devised lands to B, and then bequeathed legacies to different persons; he gave £5 to C and directed B to pay it, but gave him two years to do so. The question was, what estate had B,

1847.
Chancery.
 JOHNSON
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 Judgment.

(a) *Salk*, 239.

(b) 11 *Mod.* 206; S. C. 2 *Eq. Ca. Ab.* 300.

1847.
Chancery.
 JOHNSON
v.
 BRADY.
 ———
Judgment.

whether for life or in fee? It was adjudged to be a fee, for that the devise here was a sum in gross and a *debitum in præsentî, solvendum in futuro*, and it was a sum certain to be paid by B at all adventures. That case is not distinguishable from that now before the Court, and shows that neither the word "thereout" nor the word "paying" is required to make the payment of the legacy a condition so as to give the devisee the fee. There is no magic in these words; an order that the devisee of the lands is to pay the legacy is enough, and she taking the land must do so. That case rules this. The moment I arrive at the conclusion (as I have in this case) that the testator intended that the legacies should be paid out of the whole of the property given by the will, it follows that the widow took the entire interest in the property. I must therefore dismiss the plaintiff's bill with costs.

The *Attorney-General* submitted that, as the question on the will was a very doubtful one, the Court should not dismiss the bill with costs, according to the rule in administration suits.

THE LORD CHANCELLOR.

That rule applies only where the Court has a fund to distribute, and not to a case such as the present. This is only an ejectment bill, and I fear I cannot throw costs upon the fund.

Reg. Lib. 97, fol. 193, 1847.

1847.
Chancery.

BOROUGH v. CLOSE.

May 27.

ARTHUR FRENCH ST. GEORGE having, in the year 1823, effected insurances on his life, one with the Globe Insurance Company for the sum of £5000, the other with the Royal Exchange Insurance Company for a like sum, executed a deed of assignment, bearing date the 14th of May 1823, whereby he assigned these policies to Luke Lord Baron Clonbrock and Christopher Dillon Bellew in trust for the sole use and behoof of the younger children of him, Arthur F. St. George, namely, Arthur, Mary Anne, Olivia, Matilda, Emily, Isabella and Louisa, to be shared and divided amongst them in such shares and proportions as he should by deed or will duly executed direct and appoint; and the trustees covenanted to assign such part of the said sums to and for the use and benefit of such of his younger children as A. F. St. George should so appoint. There were also two other policies of insurance, one for £1657 and the other for £5000, effected by A. F. St. George in 1826 and 1827 on his life, which were afterwards assigned for the benefit of the younger children in like manner.

Pursuant to the power of appointment, A. F. St. George, on the marriage of his daughter Matilda with Charles Pepper, by deed of the 10th of July 1834, after reciting the two first policies and the subsequent ones, appointed (in addition to other provisions) "the sum of £2000 present currency, out of the said several sums secured by the hereinbefore recited several policies of insurance, as the share of the said Matilda St. George of the said several sums." In 1836 Arthur F. St. George made his will, directing that the trustees "should, out of the produce of the said several policies of insurance, or some or one of them, after payment of the said sum of £2000 to the said Matilda, pay and apply unto and to the use and benefit of his daughters Anne, Emily, Isabella and Louisa (Olivia having died),

Three policies of insurance on the settlor's life were assigned by a voluntary deed on trust for A, B, and his other children in such shares, &c., as he should appoint. He, on A's marriage, appointed £2000 out of the several sums secured by the policies to her. He made a similar appointment on B's marriage. By his will he appointed £2000 to each of the other children. Two of the policies having dropped before his death, *Held*, that the sums given to A and B should be paid in full according to the priorities of the appointments, and the entire loss fall on the other objects.

1847.
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 BOROUGH
 v.
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 —
Statement.

the sum of £2000 each." Upon the marriage of Louisa with Henry Bingham, A. F. St. George, in further exercise of the power of appointment, by deed of the 25th of November 1839, directed and appointed the sum of £2000 to be paid after his death to Sir Edward Borough and Henry De Montmorency, the trustees of the settlement, out of the produce of the four policies of insurance.

A. F. St. George died in 1844 without having altered or revoked his will, leaving Mary, Matilda, Emily, Louisa and Isabella and two sons, Christopher and Arthur, him surviving. After the execution of the marriage settlements, but previous to the death of A. F. St. George, all the policies except that for the £5000 with the Royal Exchange were suffered to drop, that having been kept up by the trustees of Mr. and Mrs. Pepper's settlement, and the amount of this latter was received by the defendant Close as personal representative of the surviving trustee in the deed of 1823.

The present suit was instituted by Mr. and Mrs. Bingham and their trustees against Henry Samuel Close and the younger children of A. F. St. George, in order to have the decision of the Court, the fund being deficient to pay all the sums appointed by the will and deeds, whether the sums appointed to Mrs. Pepper and Mrs. Bingham were to be paid in the first instance, or all the daughters were to abate rateably.

Mr. Serjeant *Warren*, Mr. *Hughes* and Mr. *Webber*, for the plaintiffs.

They contended that at the time of the marriage settlement of the plaintiff all the policies were in force; that the appointment of 1839 was irrevocable, and took the amount entirely out of the control of A. F. St. George; that they were purchasers for valuable consideration, while the unmarried children were mere volunteers, and that any loss which the fund sustained should be borne wholly by the parties entitled to the residue.

Mr. *J. D. Fitzgerald* and Mr. *William Smith*, for the defendants Pepper and wife, in addition to the arguments urged by the plaintiff's Counsel, also relied on the fact of having kept up the policy of

insurance, which should therefore primarily be applied to their share in full.

Mr. *Martley* and Mr. *R. R. Warren*, for Arthur St. George.

They contended that, inasmuch as the portions appointed to Mrs. Pepper and Mrs. Bingham were to be paid out of all the policies, they should bear their share of the loss occasioned by the dropping of three of them, and that as the power was to appoint to all the children and not to some only to the exclusion of the others, that power would be defeated if Mrs. Pepper and Mrs. Bingham, by receiving the whole of their portions, should exhaust the entire assets after payment of the costs and the premiums paid as salvagers by the trustees of Mrs. Pepper's settlement.

The following authorities were cited: *Wards v. Firmin* (a); *Brathwaite v. Brathwaite* (b); *Jackson v. Hamilton* (c); 2 *Sug. Pow.* p. 20; *Oke v. Heath* (d); *Clough v. Clough* (e).

The LORD CHANCELLOR.

I will consider this case. It is not the common case of portions for younger children, where all are purchasers, as the appointment refers back to the settlement, but here some of the parties are volunteers and some are purchasers.

The LORD CHANCELLOR.

I have considered this case since yesterday. I then thought a distinction might exist in the case, founded on some of the parties being purchasers for value, and some being volunteers; but it appears to me that none of the parties here are purchasers for value in a sense to support such a doctrine. The statute of Elizabeth (f) in England and of Charles (g) here does not apply to the deed as a

1847.
Chancery.
BOROUGH
v.
CLOSE.
Argument.

May 27.

May 28.
Judgment.

(a) 11 Sim. 235.

(b) 1 Ver. 334.

(c) 9 Ir. Eq. Rep. 430.

(d) 1 Ves. sen. 185.

(e) 5 Ves. 710.

(f) 27 Eliz. c. 4.

(g) 10 Car. 1, c. 3.

1847.
Chancery.
 BOROUGH
 v.
 CLOSE.
 Judgment.

purchase from the settlor, for that relates only to real estate. Therefore the prior settlement could not be defeated on that ground. No additional weight is given to it as a purchase for value, for it is merely a *chose in action*, and therefore the purchaser must take it subject to the equity attaching to it: *Daubeny v. Cockburn (a)*. The question therefore comes round simply to the effect of the instruments of appointment and the language of them. But it is important in reference to them to consider the design and duty of the party in making them, and to regard the appointments in reference to the objects of them—persons whom it was the duty of the appointor to provide for. Looking at the instrument as an appointment made for the purpose of the marriage and to secure a certainty, it does I think by its language import priority. The words are that there shall be paid out of the policies that *sum*, as appointed and set apart out of all the fund, and the deed is irrevocable from the nature of the transaction. Bearing in mind the occasion on which that was executed, it must be taken to have been done in order to secure to the appointee, at all events, the sum mentioned, leaving the other objects to take what might remain. The sum of £2000 is to be considered as given to the daughter at all events. The appointor selects that sum for her, leaving the rest of the fund as unappointed, and as the only fund to be afterwards appointed.

The case of *Oke v. Heath (b)*, mentioned in *Sugden on Powers (c)*, rested on a different ground. That was the case of a marriage settlement by which £10,000 was vested in trustees to be laid out in lands, out of which in certain events £4000 was to be raised, subject to appointment by the wife, and if not so laid out, then after payment and deduction of the £4000 to such persons as the wife should appoint, the residue was given to the husband. There was no investment in land and part of the fund was lost; and the Court held that, though not laid out in lands, as the husband would have benefited by any increase in the value of the land if bought, so he

(a) 1 Mer. 636.

(b) 1 Ves. 135, 142.

(c) 2 Sudg. P. 20.

must abide by the loss. The case depended on the language of the settlement. The authority in *Equity Cases Abridged* (a), which is there referred to, is repudiated and not approved of. In *Warde v. Firmin* (b), a question arose as here between two appointees. One question in that case was, what interest the appointees took in a fund not subject to appointment; but as between the appointees under two of the deeds the very question in this case arose; for there was only £7618 to be appointed, and the first appointment gave £4300, and the second appointment gave £4200 more; so that the fund was not sufficient to satisfy both. The Vice-Chancellor says (c): "The instruments of appointment having been made, not at the same time but in succession, they must operate so far and so far only as there are funds to allow them to operate." The only distinction suggested is that in *Warde v. Firmin* there was the option of selecting such one or more of the objects, and here the power is not exclusive. But I think that makes no difference, especially as the law now stands; for, as illusory appointments cannot now be impeached on that ground, both powers are substantially the same. I cannot rest the case on such a shadowy distinction, and I must therefore give the plaintiff the relief prayed.

The consequence of my decree will be, that the salvage money and interest upon it—that is to say, the premiums paid for the insurance and interest—will be the first charge on the fund, and the appointees will then take, as far as the funds will go, the sums appointed to them, according to the priorities of the deeds of appointment to them.

Reg. Lib. 97, fol. 84, 1847.

(a) *Chambers v. Chambers*, Eq. C. Ab. 115.

(b) 11 Sim. 235.

(c) *Ibid*, p. 254.

1847.
Chancery.
 BOROUGH
 v.
 CLOSE.
 Judgment.

1847.

Chancery.

WALCOTT v. GRAVES.

June 17.

Form of enquiry in an incumbrancer's suit, where the deeds are in possession of a solicitor, a defendant, who claims a lien for costs which is disputed.

THIS was a mortgagee's suit for foreclosure and sale. Sir E. Tierney and a Mr. Graves were made parties only in respect of certain title deeds and documents which had come into possession of Tierney as solicitor for a person formerly interested in the estate, and on which he claimed a lien for costs. The priority and existence of the lien was disputed. It was also alleged that the deeds could have been obtained by motion in a cause of *Graves v. Graves*.

Mr. *Kane* and Mr. *Todd* appeared for Sir E. Tierney.

Mr. Serjeant *Warren*, Mr. *Christian*, Mr. *Hobart*, Mr. *Bland*, Mr. *Lloyd*, Mr. *Brereton*, Mr. *Woodroffe*, Mr. *Coates* and Mr. *R. R. Warren*, appeared for other parties.

Judgment.

THE LORD CHANCELLOR said he doubted that an application by motion would have been effectual, without paying the costs in respect of which the lien was claimed; and without deciding the question of lien, made the following direction in the decree (after the directions for accounts of the plaintiff's mortgage and other incumbrances, &c.)—"Let the defendants Sir E. Tierney and R. D. Graves respectively within one month bring in and lodge in the Master's office the several deeds, documents and papers mentioned in their respective answers in this cause, and thereby admitted to be in their possession respectively, and such lodgment to be without prejudice to the lien of the said Sir E. Tierney upon the said deeds, documents and papers. Let the said Master enquire and report whether the said defendant Sir E. Tierney has any lien upon any and which of said deeds, documents and papers, for costs, in any and what suit; and if any, let the Master state the extent and nature of such lien, and the proceedings taken by the said defendant in the said suit, and against whom he is entitled to the said lien."

Reg. Lib. 97, fol. 230, 1847.

1848.
Chancery.

THE QUEEN v. HOBART.

1847.
Nov. 27.
1848.
April 20.

In this case, which was a proceeding by *scire facias* on a recognizance, the defendant had demurred to the replication of the plaintiffs. The demurrer was argued in Trinity Term 1847, and an order was made allowing it in the following words:—"Allow the demurrer taken by the defendant in this cause with costs, with liberty to the plaintiff to amend."

In proceeding on a *scire facias* on a recognizance, costs cannot be given against the Crown.

Statement.

An application was now made on behalf of the plaintiff to vary the order, by expunging therefrom the words "with costs," and adding to the liberty to amend "if so advised, on payment of costs."

Mr. *Workman*, for the application, submitted that, inasmuch as costs were never given against the Crown, the order as made was clearly irregular.

Argument.

Mr. *Clancy*, for the defendant, insisted that the order was not irregular, and cited two precedents in which orders to amend were made upon payment of costs: *The Queen v. O'Leary* (a), Jan. 19, 1842, and *The Queen v. Lynch* (b), June 19, 1844.

THE LORD CHANCELLOR.

There is no authority for giving costs against the Queen on a proceeding like this on a recognizance. The order which has been made, allowing the demurrer with costs, must be set aside as regards the costs. Let it be amended by striking out the words "with costs."

Judgment.

(a) Petty Bag Book, vol 3, p. 4.

(b) Ibid, p. 80.

1847.
Chancery.

MANNIX v. DRINAN.

June 19.

It is not necessary that the £10 lodged on appeal motions should be lodged before serving the notice of appeal.

Argument.

MR. SERJEANT WARREN was about to move an appeal from the Rolls, when—

Mr. *Deasy* objected that the appeal could not be heard, as the usual deposit of £10 was not lodged when the notice of appeal was served, although it had been lodged since. He contended that the same rule should apply to appeals which applied to exceptions to a Master's report; and that the object of requiring the lodgment would be defeated if it was not made at once, for the party appealing would have his option of going on or not, and thus get the benefit of delay, perhaps for several months, without giving the security intended for his adversary's costs.

Judgment.

The LORD CHANCELLOR, after consulting with the Registrar, said that there was no rule requiring the lodgment of the £10 before appealing; that it was not like exceptions to a report, which are lodged in a different office, while the notice of appeal is merely served through the notice office; that if it was understood that the money should be lodged the day the notice of appeal was served, it would be more convenient; but as there was no strict rule on the subject, he would hear the motion.

1847.
Chancery.

M'CARTHY v. M'CARTHY.

June 19.

IN this case the bill had been dismissed with costs. The suit had been instituted by two nuns to recover a share of an intestate's estate, and will be found fully reported *ante*, vol. 9, p. 620.

After dismissal of a bill with costs, the defendants were stayed from enforcing them, pending an appeal to *Dom. Proc.*, the plaintiffs giving security and paying interest upon them.

Argument.

Mr. *O'Brien* and Mr. *Deasy*, for the plaintiffs, now moved that the defendants should be stayed from enforcing the costs decreed to them, pending the appeal to the House of Lords, on the terms of the plaintiffs giving security for them. He cited *Meade v. Lord Norbury* (a); *Roberts v. Totty* (b); *Huguenin v. Baseley* (c); and an unreported case of *Callaghan v. Callaghan*, in this Court, where, after a decree for giving the plaintiffs possession of an estate, a similar application was granted, to stay the execution of the writ and the payment of costs, pending an appeal.

Mr. Serjeant *Warren*, Mr. *Hughes* and Mr. *R. R. Warren*, for different defendants, contended that the order sought for should not be made, considering the grounds of the dismissal of the bill; that the defendants were admittedly solvent, and that the plaintiffs, having vowed poverty, were to be indemnified by the community of which they were members, and so incurred no individual risk. They also asked for interest at £4 per cent. on the costs, if the order was made, under stat. 3 & 4 *Vic. c.* 105, ss. 26 and 27.

THE LORD CHANCELLOR.

By getting security for the costs, the defendants will be in a better situation than they are; so that the observation as to the plaintiffs' vow of poverty tells rather in favour of the application

Judgment.

(a) 4 Price, 322.

(b) 19 Ves. 446.

(c) 15 Ves. 180.

1847.
Chancery.
M'CARTHY
v.
M'CARTHY.
Judgment.

than against it. I think the order should be made, the Master to measure the security, which must be given within a month. The defendants will be entitled to the £4 per cent. interest asked for on the costs, under the statute.

The plaintiffs must pay the defendants the costs of appearing on the motion.

O'GRADY v. BRADY.

June 21.

Where a property was set up for sale by an auctioneer in the country, first in lots, then part of it in batches of some lots together, then the whole together, the auctioneer having stated that he would receive biddings and that the Master would declare the purchaser, a person who was the highest bidder for a batch of some lots, and afterwards for the whole, was held to his bidding for the lots, though he was misled by the mode of selling, and intended to bid for the whole.

Where a sale is had in the country under the 139th Order, the bidders are not entitled to have notice of the confirmation

of it by the Master. This was an appeal by John Brady (the purchaser of the premises sold under the decree in this cause) from so much of the order of the Master of the Rolls, of the 3rd of June 1847, as directed that he should bring in and lodge in bank to the credit of the cause within ten days the sum of £2500, the one-fourth of the purchase money.

The premises, comprising nine lots, were set up to be sold in the town of Cavan by an auctioneer, under the direction of the Court, on the 26th of February 1847, previous to which he published an advertisement in the public papers, stating that he had been selected to offer the said lands and premises for public competition and peremptory sale in the town of Cavan, in lots or all together, to suit purchasers, specifying the nine several lots, and then stating that the sale, being had by the consent and for the mutual benefit of all parties concerned, with a view to terminate the suit, would be open to fair and honorable competition. The auctioneer first offered the lots for sale separately, but no persons bidding, he then set up lots 8 and 9, for which James Meares bid the sum of £1500. He then set up lots 6, 7, 8 and 9 together, for which John Brady bid £10,000. The entire of the lots were then put up together, when John Brady bid for them all the sum of £15,000. All the biddings were taken down by the auctioneer.

of it by the Master.

The auctioneer having certified the several biddings to Master Brooke, he declared John Brady the purchaser of lots 6, 7, 8 and 9 at £10,000.

Brady having had no notice to attend in the Master's office, and being called upon to lodge his purchase money, refused to complete the purchase of these lots, insisting that the bidding was waived by the auctioneer subsequently setting up all the lots which Brady purchased for £15,000, which purchase he was willing to abide by. Brady and others made affidavits to show that the persons attending the sale understood that the biddings on the former occasions were abandoned, and that the last was the only peremptory sale, as the auctioneer stated that if any person did not then make an advance upon the bidding of £15,000, he could not afterwards open the sale, without offering an advance of £10 per cent. The auctioneer and the solicitor for the vendors by their affidavits stated that the auctioneer declared in the first instance that he was authorised to take the biddings, and that he would set up the lands first in lots, and subsequently ascertain if any person would bid for the entire property; that he could not declare the purchaser, but that all the biddings would be reported by him to the Master in the cause, who would declare the purchaser of any of the lots, if any of the biddings should be approved of by him.

A conditional order for an attachment being obtained against Brady for not lodging the one-fourth of his purchase money, he relied on the foregoing facts as cause, which was allowed by the Master of the Rolls, without costs; but his Honor ordered that the money should be lodged within ten days. From this latter part of the order John Brady now appealed.

Mr. Gayer and Mr. Hughes, for the purchaser.

They contended first, that the sale was irregular, and that Brady was deceived from the mode in which the lots had been set up; that he would not have bid at all except in the hopes of buying the entire; that he had no opportunity of bidding for lots from Nos. 1 to 5, if he was held to his bidding for £10,000; that though the auctioneer might adopt what order he chose in setting up the lots,

1847.
Chancery.
O'GRADY
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BRADY.
Statement.

Argument.

1847.
Chancery.

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BRADY.

Argument. •

he was bound to submit the whole estate to competition in each mode of setting it up, whereas here he had submitted the whole estate only in single lots and altogether, and then capriciously set up a batch of four lots, and thereby entrapped Brady into a bidding for them which he would never have made except with the view of securing the entire estate, when the other lots would be set up in batches of the same kind; secondly, that the last bidding was a retractation of the former one, and so understood by the bidders, who were under the impression that the auctioneer's declaration of the buyer was final, and it was so held out by the advertisement; and thirdly, that the sale was never duly confirmed, for it was necessary that the bidders should have notice to attend at the Master's office under the 139th Rule, at the declaration of the purchaser, as they might have grounds to submit to the Master to guide him as to which bidding he should select. They cited *Sugden's V. & P.* p. 20: *Stapylton v. Scott* (a); *Calverly v. Williams* (b); *Higginson v. Clowes* (c); *Harnett v. Yeilding* (d); *Malins v. Freeman* (e); *Vincent v. Going* (f).

Mr. *Christian* and Mr. *Brereton*, contra.

They contended that the sale was unobjectionable under the 139th Order, and that there was no ground for discharging Brady from his purchase, and cited *Kirwan v. Blake* (g); *Vincent v. Going* (h); *Vesey v. Elwood* (i).

THE LORD CHANCELLOR.

Judgment.

I was quite startled at the proposition which it was found necessary to lay down in order to sustain this objection, viz., that if a purchaser in his own mind forms an intention to take the entire estate, he is at liberty to insist on the auctioneer setting up the lots so as to allow him to buy. I cannot allow that there is any such

(a) 13 Ves. 425.

(c) 15 Ves. 524.

(e) 2 Kee. 25.

(b) 1 Ves. jun. 211.

(d) 2 Sch. & Lef. 549.

(f) 3 Ir. Eq. Rep. 480.

(g) 1 Hog. 151.

(h) *Ubi supra*, and note 3 Dru. & War. 75.

(i) 3 Dru. & War. 74.

right. The Master delegates power to the auctioneer. He has authority to delegate to the auctioneer the choice of the manner in which the estate can be set up with most advantage, according to his judgment and knowledge. He thinks the best course is, to set up some lots in one way and some lots in another. In this case he, in the first instance, set up all the lots separately, and then Mr. Brady might have bid for all of them if he pleased. The auctioneer then set up lots 8 and 9; and if this objection be well founded it must be pressed to this extent, that Meares, the other purchaser, is, as well as Brady, entitled to say, "I am not bound by my bidding, because the other lots of the estate were not set up in batches in the same way." The auctioneer only said, "I have entered the bidding for these lots, and I will now obtain a bidding for the entire." That the auctioneer might properly do.

If the case rested on the advertisement only it might be different. The auctioneer had no authority to make such an advertisement as he did publish. It was mere vanity of the auctioneer, and according to the common practice of his profession; but it was a great miscarriage. However, all this was corrected in the auction-room, where the real nature of the sale was explained, viz., that the actioneer could only take the biddings and send them up to the Master, who would declare the purchasers. That is what should have been stated in the advertisement; but it was communicated to Mr. Brady quite time enough. It would create great difficulty if I was to hold that the auctioneer should go through all possible varieties and combinations of the lots set up, in order that he might send up to the Master a report of all possible ways of selling the estate, and what it would bring in each way. The purchasers have nothing to do with that. The only ground which a purchaser could have for coming here on such an objection would be, that by common consent between the bidders and the auctioneer all that had been done was to be considered as abandoned and thrown over when the entire estate was set up; but the very reverse is the case here, and all the parties were fully apprised that the biddings already made were to stand, and the Master was to select the purchasers. According to the argument urged here, the Master has no right to

1847.
Chancery.
O'GRADY
v.
BRADY.

Judgment.

1847.
Chancery.

O'GRADY
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BRADY.

Judgment.

declare any one a purchaser, though the auctioneer spoke in such a way as to show that he might be declared the purchaser. There was, in reality, no mistake whatever on that point.

As to the objection that the Master should have given notice to the several bidders to attend when the purchasers were to be declared, it is without foundation. It would be wrong to give any such notice; for it would be supposing that the bidders had a right which they have not, viz., a right to retreat from the biddings which they had made at the auction. Each is bound by his bidding below, and should have no opportunity to cavil at that again in the Master's office. The Master would only be wasting his time in discussing anew the babble of the auction-room; such a proceeding was never intended by the Rule. Therefore, I think it is perfectly clear that there is no ground for discharging the purchaser on that point.

I will therefore refuse this application. The auctioneer, however, has done wrong by publishing that foolish advertisement, and it was a fair case to bring before the Court. I will therefore give costs only to the amount of the deposit, and affirm the Rolls order.

CROSBIE v. THOMPSON.

June 22.

Any documents which could be used at law as admissions to prove an agreement pleaded, may be used in evidence in equity for the same purpose, though not noticed in the bill; subject to enquiry if the defendant be taken by surprise: but such a mode of proving a case may affect the costs of the suit.

THIS was a suit to compel the defendants to indemnify certain lands which had remained in possession of a vendor, and to pay off a mortgage affecting them and certain lands which had been sold to him. It was alleged in the bill that the defendant Peter Thompson had taken upon himself the payment of the mortgage on the completion of the sale mentioned in the bill. Two accounts settled between him and the land-agent of the vendor were offered in evidence in support of this case. In these Thompson took credit

for a certain part of the purchase-money retained by him as being on account of these mortgages. They were not put in issue or at all referred to in the bill, and their admissibility was objected to on that ground.

1847.
Chancery.
CROSBIE
v.
THOMPSON.

The *Attorney-General*, Mr. *Brewster* and Mr. *F. A. Fitzgerald*,
for the plaintiff.

Argument.

Mr. Serjeant *Warren*, Mr. *Christian*, Mr. *Orpen* and Mr. *Deane*,
for the defendants.

THE LORD CHANCELLOR.

The question is, if the old rule is not entirely put an end to. *McMahon v. Burchell* (a) appears to be an authority that no such rule is acted upon now. It would seem that the rule now is the same in equity as at law, though in an equity suit such a use of admissions must certainly take the party by surprise. The rule is laid down in *Malcolm v. Scott* (b). The Vice-Chancellor says, "Another objection was, that the letters principally relied on were not charged in the bill, and it was argued that they were therefore inadmissible. The cases of *Whitty v. Martin* (c) and *Graham v. Oliver* (d) were cited, to which I have very often been referred; they appear to me to be cited for a proposition much broader than Lord Langdale ever meant to lay down. It is very difficult to say those cases could have been decided otherwise than as they were, but the marginal notes go much further than the judgments. This bill however expressly charges that there was an agreement for giving the lien in question, and I am perfectly clear, according to the rule Lord Cottenham laid down, that whatever would be evidence of an agreement at law is evidence in equity, subject to this, that if one party should keep back evidence which the other might explain, and thereby take him by surprise, the Court will give no effect to such evidence without first giving the party an opportunity

Judgment.

(a) 2 Ph. 127.

(b) 3 Hare, 39; see p. 63.

(c) 3 Beav. 226.

(d) 3 Beav. 124.

1847. *Chancery.*
CROSBIE
v.
THOMPSON. The course pursued will, however, have great weight in the question of costs, if the Court should feel coerced to give a decree for the plaintiff on these documents.

Judgment.

FEE v. COBINE.

June 25.

A, being in prison as an insolvent, assigned to B a leasehold interest for a sum of money which discharged all A's debts, including debts to B and head rent, but was less than the value. The deed purported to be an absolute sale, but there was an indorsement that if A paid B upon a day named the purchase money and costs and all expenses of cropping the farm, B would reassign the lands and the deed should be void. B also a few days after gave a bond to surrender the premises if paid on the day. The same attorney acted for both parties. *Held*, under the circumstances, that the transaction was a mortgage and not a conditional sale.

JOHN FEE the plaintiff being entitled to a farm of about twenty acres, subject to a rent of £26. 16s. 10d. Irish, held for a life still in being, became indebted to the defendant in the sum of £15. on notes, and to Elizabeth Cobine in a sum of £29. 10s. interest and costs on foot of a judgment of Hilary Term 1840, and also in several small sums. He presented a petition under the Insolvent Acts, whereupon an arrangement was entered into between Elizabeth Cobine and the plaintiff that she should pay plaintiff's debts upon getting an assignment of his interest in the farm. A deed was accordingly executed between the plaintiff and Elizabeth Cobine on the 15th of April 1842, whereby, after reciting the title of the plaintiff and that he had contracted and agreed to sell to Elizabeth Cobine all his interest in the lands and premises for the sum of £138. 14s., he conveyed and assigned to her all his interest therein absolutely. There was no covenant to repay the purchase-money or proviso for redemption in the deed, but there was indorsed on it at the time of its execution the following memorandum:—"It is agreed upon between the parties to the within deed that if the within named John Fee pays to the within named Elizabeth Cobine the consideration money expressed in the within deed, and all costs incurred in putting in

and taking out the crop in said farm, that the said Elizabeth Cobine shall re-assign the lands and premises herein contained to the said John Fee, and that this deed, on payment or tender of the above sums when ascertained, shall be null and void, said sums to be paid on or before the 1st day of January next."

A bond was executed by Elizabeth Cobine to the plaintiff on the 21st of April for £200, the condition of which was, that "if the plaintiff should pay Elizabeth Cobine the consideration money for the purchase of the lands, with all such charges and expenses as she should be at or put to in cropping the aforesaid lands, and other expenses she may be necessarily put to, and that said Elizabeth Cobine, when fully satisfied and paid the aforesaid sums when ascertained, shall surrender and deliver up the aforesaid lands and premises unto the said John Fee, his heirs and assigns," that then the bond should be void.

It appeared that the deed was prepared by the solicitor of Mrs. Cobine and brought to the plaintiff for execution in prison; that he then for the first time insisted that he should have the right to get back the farm upon paying all the money and costs of cropping, &c., by the 1st of January; that the solicitor told him he should have an attorney for himself, upon which he requested that gentleman to act for him and not put him to the expense of another attorney, and that thereupon the solicitor prepared and indorsed the memorandum on the part of both parties. The land was next day given up to Mrs. Cobine, and the plaintiff not being able to pay the money on the 1st of January, the solicitor delivered up the bond to her according to arrangement. Mrs. Cobine paid £14 arrears of head-rent, which, with other debts and expenses of the deed also paid by her, made the amount of the consideration money; and she continued in possession of the premises and expended a considerable sum upon them. There was evidence of the lands being worth more than the consideration paid at the time of the assignment, but there was also evidence that the farm was in a very worn out condition.

In 1844 the plaintiff insisted that Mrs. Cobine was bound to re-convey to him upon payment of all sums due to her, and on her refusal so to do, he filed a bill against her, treating the deed

1847.
Chancery.
FEE
v.
COBINE.
—
Statement.

1847.
Chancery.
 FEE
 v.
 COBINE.
 ———
Argument.

as a mortgage and seeking to charge her as mortgagee in possession. Mrs. Cobine having died, the suit was revived against the present defendant as her heir-at-law and personal representative.

Mr. Serjeant *Warren* and Mr. *S. B. Miller*, for the plaintiff.

They contended that the deed was originally a mortgage, a loan of money being contemplated and not an absolute sale; that at all events the subsequent transactions and the bond established it as such, and the rule once a mortgage always a mortgage applied: *5 Jar. Byth.*, p. 88; and that the interest was conveyed for an under-value under such circumstances as would make it fraudulent and void as a sale: *Drew v. Porter (a)*.

Mr. *Butt* and Mr. *Molyneux*, for the defendant.

They argued that the sale was absolute, or at all events only a conditional sale and not a mortgage, and relied on the absence of any covenant for repayment of the purchase-money: *Endsworth v. Griffith (b)*, *Tasburgh v. Echlin (c)*; and contended that the inference from the language of the bond was against the plaintiff, and that at all events it would not convert what was originally a sale into a mortgage: *Davis v. Thomas (d)*; *Barrell v. Sabine (e)*.

THE LORD CHANCELLOR.

Judgment.

I regret that I have to dispose of this cause, as the plaintiff cannot be very much a gainer in the end. On the entire of the case, however, I cannot come to the conclusion that the plaintiff intended to make an absolute sale of the property and to tie up his hands. The proviso indorsed in the deed is certainly ambiguous; it does not contain the words of re-purchase, but it is very like to the proviso contained in mortgage deeds. The words are not a contract giving a right to re-purchase, but they give the grantor a right of repayment and nullification of the instrument. It is similar to the case

(a) 1 Sch. & Lef. 182.

(b) 2 Eq. Ca. Ab. 595; S. C. 5 Bro. P. C. 184, on appeal.

(c) 2 Bro. P. C. 265.

(d) 1 Russ. & My. 507.

(e) 1 Vern. 268.

of *Barrel v. Sabine* (a). There was an agreement with the grantor, and then a deed of absolute conveyance, but the grantee declared that if Sabine, the grantor, would repay his money within a year and a-half, and give him £100 for his pains, he, Sabine, should have the estate again. That appears to have been a declaration not cotemporaneous with the purchase but subsequent to it. The case made was that the sale was at an undervalue and that the buyer made this declaration, and it was held to be a sale and not a mortgage. But in this case the party who was in possession of the property was just about being discharged as an insolvent, and the property would be taken by the assignee and sold by him for the payment of the insolvent's debts. In what better position would he be by this transaction if it were to be considered as a sale, than he would have been in by a sale by the assignee? It would give him nothing more than he would have through the Insolvent Court. I cannot therefore come to the conclusion that the grantor intended to give up his property absolutely and leave himself to the chance of being able to repay the purchase money at the time mentioned in the deed.

There is on the other hand the bond. I make no observation on Murphy's evidence; but it is to be desired that the bond had been more specific, and that there had been separate attorneys for the parties. It appears to me that something of a colour is attempted to be given to the transaction, though I am very far from saying that it was done with a fraudulent intent.

I have great doubt that the plaintiff will make any thing by this decree; but looking at all the circumstances of the case, it strikes me that the transaction is more like a mortgage than a conditional purchase. I must at the same time say that on the whole this is a very doubtful case, considering the position of the plaintiff, and that he was not a free agent at the time. If it had been a transaction between parties who had each their respective attorney, and the plaintiff had not been under the pressure of the defendant, I should be very slow in considering this transaction a mortgage, *merely* on account of the insufficiency of the price paid by the defendant.

(a) 1 Vern. 268.

1847.
Chancery.
 FEE
 v.
 COBINE.
 Judgment.

1847.
Chancery.
 FEE
 v.
 COBINE.
Judgment.

On the whole of the case as it is, however, I think the plaintiff is entitled to redeem, on the terms of taking the sum stated in the deed as the starting point. I shall declare therefore that the deed is a mortgage for that sum, and the defendant must account for such occupation rent as the Master shall fix, giving her credit for any incumbrances upon the land which have been paid by her. She is also to be allowed for all moneys expended by her in lasting and permanent improvements. I shall not make any decree as to the costs until I see how the accounts will turn out.

Reg. Lib. 97, fol. 271, 1847.

JOLY and others v. SWIFT.

June 29.

A former decree dismissing a bill if not enrolled and pleaded is not an absolute bar to another suit for the same demand; if it is relied on by answer and appears not to have been on the merits it is no defence.

THIS was a suit instituted by Joly a trustee and his *cestui que trusts* as co-plaintiffs, to raise a legacy charged on the real estate of the defendant Swift. A former suit had been instituted by the plaintiff Joly for the same object, but from failing to prove the deed assigning the charge to him had been dismissed with costs (a). The decree dismissing Joly's bill had never been enrolled. It merely directed the bill to be dismissed with costs, and contained no entry of evidence being read. Very soon after this dismissal a notice was served by the plaintiff's solicitor, stating that the plaintiff's demand would be immediately discharged if no further expense was incurred. The defendant did not plead the dismissal, but relied on it in his answer as a bar to the present suit.

Argument. The *Attorney-General*, Mr. *Brewster* and Mr. *Maley*, for the plaintiff, submitted that, although the former dismissal was not expressly made without prejudice, it was plain on the face of it that it must have been made purely for failure of proof; that the

(a) See the case reported *ante*, vol. 9, p. 195.

notice was a subsequent admission of the demand, and proved that this was the case; that the utmost effect of relying on the dismissal would be to force the plaintiff to rehear that cause, to have the words "without prejudice" added; that not being enrolled it could not be pleaded, and if set up by answer and not pleaded it was not an absolute bar, but might be explained: *Story's Equity Pl.*, par. 793; and that it did not affect Joly's co-plaintiffs at all: *Nelthorp v. Holgate (a)*.

1847.
Chancery.
JOLY
v.
SWIFT.
Argument.

Mr. Hughes, Mr. Deasy and Mr. Kiernan, for the defendant, contended that the other plaintiffs could not recover if Joly was barred by the former dismissal: *Richardson v. Nixon (b)*; that it was a flat bar to his rights, until reversed by bill of review or on a rehearing, and the grounds on which it was made were wholly immaterial; that the want of enrolment only prevented the defence being made by plea, but it was still available and equally effectual if made by answer: *Pickett v. Loggon (c)*; *Jones v. Nixon (d)*; that even if the grounds of it could be gone into there was nothing proved to explain them; and that the notice could not be used, as there was no authority to serve it.

THE LORD CHANCELLOR.

It is evident on the face of this decree that the plaintiff did not prove his case, that no evidence was given, and that was the ground of the dismissal. I should rather think that a decree not having been enrolled or pleaded could not stand as an absolute bar in the way of another suit. It is quite apparent that this decree was not a dismissal on the merits, and as it is set up in the answer it is no bar. The leading case on this subject at law is *Vooght v. Winch (e)*, which decides that a former recovery if it is not pleaded, but merely given in evidence, is not an estoppel. The same rule applies here. There must be a decree to account.

Judgment.

Reg. Lib. 97, fol. 288, 1847.

(a) 1 Col. 203.

(b) 7 Ir. Eq. Rep. 620.

(c) 14 Ves. 215.

(d) 1 You. 359.

(e) 2 B. & A. 662.

1847.
Chancery.

MOORE v. THE MARQUIS OF DONEGAL,

And three other causes.

Nov. 6.

Lord D. was tenant for life of certain estates, subject to a charge on the inheritance vested in S. A bill was filed by Lord D.'s own creditors and a receiver was appointed over the estates. S. filed a bill to raise his charge. Lord D. died in October 1844; and S. obtained an order in January 1845, that the receiver should be extended to S.'s cause so far as related to the rents due at the time of the decease of Lord D., and then remaining uncollected. A sum being in the receiver's hands consisting of rents due in Lord D.'s life time; *Held*, that the creditors of Lord D.'s life estate were entitled to the rents received before, and S. to the rents received after the order of January 1845.

The extension of a receiver in an abated suit against a tenant for life, after his death, to a suit by a creditor on the inheritance, is not irregular.

THIS was an appeal from the order of his Honor the Master of the Rolls, of the 5th of July 1847, directing that rents due to a deceased tenant for life, collected by the receiver extended to the cause of a creditor on the inheritance but appointed in the cause of a creditor on the life estate, should be paid to the former, to the amount of the rent collected since the extending order. The case at the Rolls is reported *ante* p. 364.

Mr. Martley and Mr. Hughes, for Moore the appellant, the creditor on the life estate.

Mr. Serjeant Warren and Mr. Dix, for Stewart the respondent, the creditor on the inheritance.

The cases cited were the same as at the Rolls. It was also contended that the extension of the receiver, being after Lord Donegal's death, when the first cause was abated, was irregular.

THE LORD CHANCELLOR.

I must affirm the decision of the Master of the Rolls. As to the order for a receiver, it is said it is so contradictory as to be nugatory. That is not so. I read it thus:—"If you have a right to attach those rents, you shall attach them; but if you do not fill such a character as entitles you to attach them, you are not to be considered as attaching them." I cannot see how the Court could justly refuse to put the applicant into privity with the funds if he may have rights against them.

I see no objection arising from the death of Lord Donegal. What

was there to prevent the filing of a supplemental bill, and obtaining receiver in an abated suit against a tenant for life, after his death, to a suit by a creditor on the inheritance, is not irregular.

the extension of the receiver? I do not see why a creditor is to be prevented from extending a receiver because the parties in another cause will not revive it. He has his own rights to enforce. The others are collecting the rents *in invitum* as to him, and he comes to the Court and asks to be put into privity with the fund. The mere act of extending the receiver is not prevented by the abatement. All parties were interested in getting in the rents, and the very person objecting to these orders has taken advantage of them, and had the benefit of them.

But the substantial question is, whether the party claiming them had a right to attach those rents? No authority has been cited on the question of a person's right to attach rents of the estate of a debtor which has ceased before he applies against them. However, that is hardly in dispute here, for both sides assent to it; and the personal representative of Lord Donegal makes no objection. If there was a suit for the general administration of Lord Donegal's estates it might raise a difficult question, but the equities which would then exist do not arise here. This is merely a case in which one creditor having a claim on the life estate has got a receiver in the lifetime of the debtor, and another creditor having a claim on the inheritance has had that receiver extended to his demand and claims the rents received. What objection is there to that? There would be an objection to not allowing it; for then a creditor of the tenant for life filing a bill the day before the tenant for life died would get the arrears of rent, however large, then due, to the exclusion of the prior creditor, whose demand overrode the inheritance. No authority has been cited either way. I think the Court would have had no right to refuse to extend the receiver, and the order is capable of a plain meaning. The meaning, as I have said, is that the creditor is to have the benefit of the attaching order, if he has rights against the fund, and not to have that benefit if he has not those rights. If the motion had been before me I would have had great difficulty in making any other order. Having no other creditor than Mr. Moore before me, I think the justice of the case is attained by the order of his Honor the Master of the Rolls; and this motion being against both his opinion and mine, the appellant must pay the costs.

1847.
Chancery.
 MOORE
 v.
 THE MAR-
 QUIS OF
 DONEGAL.
 ———
Judgment.

1847.
Chancery.

Ex parte TOTTENHAM,
In re LOFTUS A. TOTTENHAM, a Lunatic.

Nov. 6, 8.

A payment out of accumulated rents to a lunatic's son, tenant in tail in remainder, to furnish the mansion-house in which he lived, refused; but a sum allowed for repairs, it being found to be beneficial to the estate that the son should continue to inhabit it.

THIS was an application in a lunacy matter for a part of the fund in Court, consisting of rents received, to be applied in furnishing and repairing the mansion-house. The lunatic was tenant for life, and the applicant Loftus Abraham Tottenham was his only son and remainderman in tail. The other presumptive next-of-kin, the lunatic's only daughter, opposed the application.

Mr. *Kelly*, for the petitioner.

Mr. *T. R. Henn*, for the other next-of-kin.

The LORD CHANCELLOR.

Judgment.

I do not see how I can do any thing for the applicant as to furnishing the house. The Court has provided an ample maintenance for this gentleman, and cannot go further and provide a furnished house for him. But as regards the house itself I can do something. It is shown to be very unfit even for a gentleman of moderate fortune; but even as to that part of the application I can do nothing, except for the benefit of the lunatic or the estate. Therefore I will send the case back to the Master to enquire whether it would be for the benefit of the estate that this gentleman should reside; and as consequential to that he will enquire whether a part of the house is fit for his residence, and if not what part should be put into repair for him. That is the utmost I can do.

His Lordship made no rule on the petition so far as related to the purchase of furniture proposed by the petitioner; and referred

it back to the Master "to report in relation to the repairs of the house, whether it is for the benefit of the estate of the lunatic that the petitioner should reside in the house; and in case he is of opinion such residence is for the benefit of the estate, that he do enquire and report whether, having regard thereto and to the income of the petitioner allowed in this matter, a sufficient portion of the house is now occupied by him; and if not, that the Master do allot a sufficient portion of the house as he shall think proper for such residence; and in that case report what would be necessary to put the same in tenantable order and repair, as if the same were to be let to a tenant; and out of what funds such should be paid."

1847.
Chancery.
Ex parte
TOTTEN-
HAM.
Judgment.

On the coming back of the report his Lordship ordered in confirmation thereof that the petitioner should reside in the house, and that the sum of £150 should be paid to him for the repairs of the mansion-house out of the funds in the receiver's hands, and that no further expense should be incurred in reference to the matters in the petition mentioned.

GRAHAM v. WALKER.

Nov. 8.

THIS was a redemption suit against a mortgagee in possession under a mortgage of 1816. Rents had been from time to time received by him, which reduced the debt below the principal sum due on foot of the mortgage. The decree to account did not contain any direction as to taking rests.

The Master, in taking the accounts, made half-yearly rests, but

interest on payments exceeding the interest due to him received at any intermediate periods, no matter how frequently the payments are made.

It is the settled practice of this Court, in taking accounts against mortgagees in possession, to make half-yearly rests, and not to charge against the mortgagee

1847.
Chancery.
GRAHAM
v.
WALKER.
Statement.

he did not charge the mortgagee with interest on the sums paid to him on foot of rents from the date of those payments to the next rest, even when the debt was reduced below the principal sum. He found a sum less than the principal sum still due to the mortgagee. The case now came on to be heard on exceptions to the report, the principal of which was, that the Master should have made intermediate rests, and charged the mortgagee with interest on the rents paid from the day of each payment to the next half-yearly rest, wherever that payment exceeded the interest then due.

Argument.

Mr. *Gayer* and Mr. *Atkins*, for the defendant, contended that the rents and profits, as often as they exceeded the interest, should be at once applied to liquidate the principal, and for that purpose a rest should be made whenever a sum exceeding the interest due was paid, though occurring in the interval between rests: *Binnington v. Harwood* (a); *Heighington v. Grant* (b); *Raphael v. Boehm* (c); *Clancarty v. Latouche* (d).

Mr. Serjeant *Warren* and Mr. *Hickson*, for the plaintiffs, insisted that the practice in Ireland was well settled as contrary to *Binnington v. Harwood*, and that as the rests were taken half-yearly against the mortgagee, he was not also to be charged interest on payments received by him in the intervals.

Judgment.

The LORD CHANCELLOR said that, as at present advised, he would not allow the mortgagor, as against the mortgagee in possession, both half yearly rests and also interest on every payment made from the date of the payment; that he understood the practice in this Court had never been to take rests in such a case otherwise than half yearly, unless there was some special direction in the decree, and the practice in the Court of Exchequer was similar; and that he would be very slow to disturb any practice which has prevailed in the offices for many years past. His Lordship stated he would send a

(a) *Tur. & Rus.* 477.

(c) *11 Ves.* 92.

(b) *5 My. & Cr.* 267.

(d) *1 B. & Bea.* 427.

query to the Masters, and request them to certify their practice in such cases.

1847.
Chancery.
GRAHAM
v.
WALKER.
Judgment.

The following query was sent to the Masters :—

“What has been the course of the office in taking accounts against mortgagees in possession where half-yearly rests are made, and where in a particular half-year a sum is paid which at the time of the payment exceeds the interest then due? Has it been the practice to charge such sum as paid on that day so as *pro tanto* to reduce the principal, or to take the account at the end of the half-year?”

The following certificate was returned by the Masters :—

“In reply to the above query, we respectfully certify that in all cases in which accounts are directed in the ordinary form and without any special direction on the subject against mortgagees in possession, rests are made half-yearly and not at any intermediate period, no matter how frequently payments may have been made. Such has been within our experience the uniform practice, and therefore in the case suggested we should not in the absence of any special direction consider that any rest should take place at the date of the payment or until the end of the half-year.

WILLIAM HENN.

EDWARD LITTON.

WILLIAM BROOKE.

JEREMIAH JOHN MURPHY.”

The LORD CHANCELLOR said he had received from the Masters their certificate of the practice in the offices, which had been always uniform upon the question. He considered the certificate conclusive on the point, and overruled the exceptions, adding, that the Chief Remembrancer had verbally certified the practice in the Court of Exchequer to be similar.

Nov. 12.

Reg. Lib. 98, fol. 89, 1847.

NOTE.—The Reporters have ascertained that the practice as above certified has obtained since the year 1811, at which period a certificate to the same effect was given by the Masters to Lord Manners, and that a similar certificate was afterwards sent to Sir Edward Sugden.

1847.

Chancery.

MARY RUSSEL, a married woman, and MARY ELIZABETH
RUSSEL, an infant, by J. A. RUSSEL, their next friend,

v.

DIXON and others.

Nov. 3, 4, 8.

By his will testator gave £2000 to his natural daughter for her separate use, the interest to be expended in her education. By a codicil he gave her £3000 in addition to the £2000. By a subsequent codicil, stating that he had not time to alter his will, to guard against risk, he charged all his property with £20,000 for his daughter (calling her by his own name) subject to the limitations and restrictions mentioned in his will. *Held*, that the £20,000 was in substitution of the gifts in the will and first codicil.

STEPHEN DIXON, by his will made the 10th of August 1833, devised and bequeathed his real and personal estate in trust for the payment of his debts, legacies and annuities, and then bequeathed as follows : " I give to my natural or reputed daughter Mary Sheehan £2000 for her sole and separate use ; the interest thereof at £5 per cent. from the time of my death to be expended in her education, which I wish to be continued at Bristol or somewhere in that neighbourhood." He made a codicil on the 17th of August 1838, which contained the following bequest :—" I add £3000 to the £2000 to which Mary Sheehan is entitled under my will, by which she becomes entitled to £5000."

On the 4th of September 1839, the testator executed a further testamentary instrument, in which was the following clause :—" Not having time to alter my will, and to guard against any risk, I hereby charge the whole of my estates and property in the funds with the sum of £20,000 for my daughter Mary Dixon, subject to the limitations and restrictions in my will contained as to marrying with consent, and soforth, of my brother Colonel John Dixon, and my brother the Rev. Richard Dixon." The testator gave the residue of his real and personal estate to his brothers John and Richard. This instrument was described as a will in the attestation clause. The testator died in a few days after, and the will was proved by his executors.

Mary Sheehan intermarried with consent with Richard Russel ; and by marriage settlement of the 23rd of July 1840, the sum of £20,000 (which had been paid to her without prejudice to the question of her right to the £5000 also) together with the £5000, was

settled upon certain trusts under which Mrs. Russel was entitled to an estate for life for her separate use, and the issue of the marriage were ultimately entitled to the corpus.

In December 1840 Russel and wife filed their bill in this Court against the executors and the residuary legatees and devisees, claiming the £5000 in addition to the £20,000. The cause was heard by Sir Edward Sugden on the 7th of December 1842, who dismissed the bill, holding that the £20,000 was given in substitution for the former bequests.* After the filing of the bill, but previous to the hearing, there was issue of the marriage, Mary Elizabeth Russel, who was not made a party to that suit. The present bill was filed in 1846 by Mary Russel and her daughter Mary Elizabeth, and insisted that the former suit was defective and irregular in not having made the infant daughter a party, and in having made Mary Russel a co-plaintiff with her husband, instead of suing by her next friend, the subject matter of the suit, so far as she was concerned, being limited to her separate use; and that the decree was erroneous and not binding on them; and they now insisted that the legacy of £20,000 was in addition to, and not in substitution of, the previous legacies of £2000 and £3000.

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The *Solicitor-General* (Mr. Monahan), Mr. *Christian* and Mr. *Thomas Graydon*, for the plaintiffs.

Argument.

Mr. *Longfield*, Mr. *Gayer*, Mr. *Barlow* and Mr. *Smith*, for the several defendants.

The arguments of Counsel on both sides, in relation to the construction of the will, were similar to those urged in the former suit, and will be found in the report of that case. The following authorities, both on the point of construction and the question of parties and pleading, were relied on:—

Hookey v. Hatton (a); *Hurst v. Beach* (b); *Tweeddale v. Twee-*

(a) 1 Bro. C. C. 390, n.

(b) 5 Mad. 351.

* This case is fully reported *ante* vol. 4, p. 339, and 2 Dru. & War. p. 133.

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dale (a); *Lee v. Pain* (b); *Armstrong v. Millar* (c); *Coote v. Boyd* (d); *Barclay v. Wainright* (e); *Robley v. Robley* (f); *Osborne v. Duke of Leeds* (g); *Allen v. Callow* (h); *Graves v. Hicks* (i); *Briscoe v. Perkins* (k); *Grave v. Lord Salisbury* (l); *Ex parte Pye* (m); *Windham v. Windham* (n); *Wray v. Field* (o); *Benyon v. Benyon* (p); *Luisse v. Lord Lowther* (q); *Ridges v. Morrison* (r); *Mackenzie v. Mackenzie* (s); *Radburn v. Jervis* (t); *Frazer v. Byng* (u); *Pym v. Lockyer* (v); *Guy v. Sharp* (w); *Kidd v. North* (x); *Mackenzie v. Taylor* (y); *Cuffe v. Young* (z); *Rochfort v. Fitzmaurice* (aa); *Currie v. Pye* (bb); *Hodges v. Peacock* (cc); *Tullett v. Armstrong* (dd); *Shudale v. Jekyll* (ee); *Lowndes v. Lowndes* (ff); *Wetherey v. Dixon* (gg); *Powell v. Cleaver* (hh); *Perry v. Whitehead* (ii).

Nov. 8.
Judgment.

THE LORD CHANCELLOR.

I will look further into this case; but it seems to me now to rest merely on the construction of the last document, whether it is to be treated as a codicil or a new will. I cannot read this as meaning "not having time to alter my will, I do alter it;" and the true question is, what is its meaning? If the testator intended merely

(a) 10 Sim. 453.
 (c) Long. & Town. 557.
 (e) 3 Ves. 462.
 (g) 5 Ves. 369.
 (i) 6 Sim. 391.
 (l) 1 Bro. C. C. 425.
 (n) Finch, 267.
 (p) 17 Ves. 34.
 (r) 1 Bro. C. C. 389.
 (t) 3 Beav. 450.
 (v) 5 My. & Cr. 29.
 (x) 14 Sim. 463; S. C. 2 Phil. 91.
 (z) 2 Jo. & Lat. 17.
 (bb) 17 Ves. 462.
 (dd) 4 My. & Cr. 390.
 (ff) 15 Ves. 301.
 (hh) 2 Bro. C. C. 499.

(b) 4 Hare, 201.
 (d) 2 Br. C. C. 521.
 (f) 2 Beav. 95.
 (h) 3 Ves. 289.
 (k) 1 Ves. & Bea. 485.
 (m) 18 Ves. 147.
 (o) 2 Russ. 257.
 (q) 2 Hare, 424.
 (s) 2 Russ. 262.
 (u) 1 Russ. & My. 90.
 (w) 1 My. & Kee. 589.
 (y) 7 Beav. 467.
 (aa) 2 Dr. & War. 1.
 (cc) 3 Ves. 735.
 (ee) 2 Atk. 518.
 (gg) 19 Ves. 407.
 (ii) 6 Ves. 548.

to make an addition to his will he knew how to do it. He used the phrase "not having time to alter my will," after having already altered it by two codicils. I must give it some meaning not contradictory. I think the testator intended to say this, "not having time to make all the will new, at full length, I make this addition to it, to have so far the effect of a new will." In this view it would seem that he intended this to be a new will *pro tanto*, and if a new will, that it should in itself give the legatee the entire of what the testator meant to give her. The other matters relied on are I think of little value. I attach no weight to the distinction founded on the word "add" occurring in some other codicils. He concludes the whole with the instrument in which he says in effect "I have not time to write out a new will; but I will make so much of a new will as to show what if I made a new will I would give the legatee, *i. e.*, the increased legacy." I will consider the case, because it comes before me after the decision of another Judge; but I do not see how I can avoid coming to this conclusion.

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The LORD CHANCELLOR continuing of the same opinion, the bill was dismissed with costs.

Nov. 23.

Reg. Lib. 98, fol. 116, 1847.

HODNETT v. GOING.

Nov. 10.

A consent in this cause, dated in February 1846, was in that month by an order at the Rolls made a rule of Court, whereby it was declared that the plaintiff was entitled to redemption of the premises mentioned in the bill; and it was referred to the Master to

Where the parties before decree entered into a consent to take accounts, which was made a rule of Court,

and a Master's report obtained on it, upon which the cause was set down; *Held*, the cause could not be heard.

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take an account of the sum due to the defendant for rent and arrears of rent of the premises and for the costs of an ejectment mentioned in the bill, and an account of what the defendants, without wilful default, made out of the premises since the execution of the habere; and that in taking such account the defendant should be charged in the same manner, and have the same credits and allowances as if the account was taken under a decree for redemption, and that the Master should set off the sum found due from the defendants against the sum found due to them, and strike a balance; with liberty both to plaintiff and the defendants to object and except to said report in the same manner as if it were made under an order directing preliminary accounts; and that when said report should be confirmed, the cause should be heard upon the same, and that all the costs of the cause subsequent to the filing of the bill be reserved until the return of said report, the plaintiff hereby waiving any claim to the costs of the bill in consideration of said consent. Then followed the terms of an arrangement to give the plaintiff possession and allow the defendant to draw part of the sum lodged in Court.

The cause was set down on the report made under this consent.

Mr. Deasy having stated how the cause was set down, was about to open the case, when—

Judgment.

The LORD CHANCELLOR refused to hear the cause, saying he had no more jurisdiction than if the consent was to take the accounts out of Court; that the consent was imperfect; but the parties might agree to be bound by the accounts already taken, and then set down the cause for hearing in the usual way, when accounts could be directed having regard to those so taken. His Lordship observed that such irregular short-cuts frequently lead to more expense than allowing the cause to take its usual course.

Reg. Lib. 98, fol. 43, 1847.

NOTE.— See the case of *Leech v. Law*, ante p. 136.

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DILLON v. DILLON.

Nov. 11.

SIR CHARLES DRAKE DILLON, Bart., being seised in fee of certain estates, by his will, bearing date in 1837, devised them to the use of his brother Arthur Richard Dillon for life, remainder to his first and other sons successively in tail male, remainder to testator's brother William Dillon for life, remainder to his first and other sons successively in tail male, with various other remainders over. The will contained a leasing power to the successive tenants for life when in possession, and also the following jointuring power:—
“Provided always, and I do hereby authorise and empower the several persons to whom I have limited estates for life respectively, when in possession of the lands so to them respectively limited, by any deed or deeds sealed and delivered in the presence of, and attested by, two or more credible witnesses, to grant, limit and appoint an annual sum or rent-charge, not exceeding £500 clear of all taxes and deductions whatsoever, to be issuing out of the said manors and other hereditaments so to them respectively devised as aforesaid, or any part thereof, to or for the use of any woman or women whom they may respectively marry, for the life or lives of such woman or women, by way of jointure and in bar of all dower; said jointure to be in proportion to the marriage portion they shall respectively receive with their respective wife or wives: that is to say, the sum of £100 jointure for every £1000 they shall so actually receive as a marriage portion with their respective wife or wives, if they shall so think fit, but in no case to exceed said sum of £500; such grant, limitation or appointment to be made either before or after marriage.” There was also a power to the tenants for life in possession to charge for the portions of younger children a sum of

A power was given by will to successive tenants for life to limit a rent-charge “for any woman or women whom they may respectively marry,” by way of jointure and in bar of dower, “to be in proportion to the marriage portion they shall respectively receive with their respective wife or wives; i. e., £100 jointure for every £1000 they shall so actually receive as a marriage portion with their respective wife or wives, if they shall so think fit,” not to exceed £500; “such grant, limitation or appointment to be made either before or after marriage.”

Held, that the wife of a tenant for life, who after wards came into possession, but who had been married previous to the will, was not an object of the power, there being no grounds from the rest of the will for giving a past meaning to the words of futurity; and *Seemle*, that money of the wife which had been settled to her separate use, with remainders to the husband and children of the marriage, was not “received” by the husband within the meaning of the power.

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£3000, "or the sum they shall respectively have received with their respective wife or wives."

Sir Charles Drake Dillon having shortly after died without issue, Sir Arthur Richard Dillon succeeded to the estates, for life, under the will.

By the marriage settlement of Sir Arthur Richard Dillon, executed in October 1834, upon his marriage with the plaintiff Letitia Elizabeth Knox, a legacy of £5000 and also one-third of £3000 and a share of the ultimate residue of the real and personal estate of her late father and one-third of the residue of other personal estate to which she was entitled were assigned to trustees to pay the annual proceeds to the plaintiff during the joint lives of her and her husband, for her sole and separate use during her life, and after the death of either to the survivor for life, the principal to be disposed of after the death of the parents amongst the children. The legacies and shares, amounting to over £6000, were subsequently realised and paid to the trustees. The plaintiff also, in the year 1844, became entitled to a sum of £1900 as one of the next-of-kin of Letitia Knox, which sum was received by her husband.

By deed of 1st of June 1841, reciting the jointuring power, and duly executed, Sir Arthur R. Dillon limited, appointed and charged the lands with a sum of £250 per annum by way of jointure for the plaintiff; and by deed of the 29th of August 1844, also duly executed, he increased the jointure to £300 per annum.

Sir Arthur R. Dillon died in July 1845 without issue, whereupon William Dillon became entitled to the estates for life, and the plaintiff filed the bill in this cause to raise the arrears of the jointure of £300 a-year.

The defendant Sir William Dillon by his answer insisted that the deeds of 1841 and 1844 were not appointments in exercise of the jointuring power, of which the plaintiff could not be an object, inasmuch as that power applied only to wives married *subsequently* to the date of the will or the death of Sir Charles Drake Dillon; and also, that Sir Arthur R. Dillon did not receive with the plaintiff any portion which would entitle him under the provisions of the will to settle any jointure on her, or at all events that he did not receive a

portion to the extent of the jointure which he purported to appoint to her.

Mr. Serjeant *Warren*, Mr. *Brewster* and Mr. *Hans H. Hamilton*, for the plaintiff.

They argued, first, that both according to the manifest intention of the testator and the fair construction of the jointuring power the plaintiff was an object of it. Though the words "may marry" and "shall receive" are in strictness prospective, yet in many cases words of prospective signification have been held to have a retrospective effect. Thus "*procreandis*" extends to issue born before, and is read as *procreatis*: *Co. Lit.* 20, *b*; and a devise to sons lawfully to be begotten of I. S. was held to include a son born before the date of the will: *Doe d. James v. Hallett* (*a*). Secondly, they urged that the portion brought by the plaintiff was substantially "received" by her husband. Even a wife's separate estate is to the benefit of her husband: *Earl of Tyrconnell v. Duke of An-caster* (*b*). A contingent life estate was given to the husband and the principal was secured for the children, which was manifestly one of the principal objects of the testator, whose intention was merely that the money should be brought into the family. A wife often is given the life use to protect the property, while the husband has really the benefit, as he had actually in this case. At all events a sum of £1900 was actually received by Sir Arthur Dillon before the second settlement in 1844, and the appointment will be a good exercise of the power *pro tanto*: *Alleyn v. Belchier* (*c*); *Sugden on Powers*, App. xvi.

Mr. *Christian*, Mr. *Napier* and Mr. *Richard McCausland*, for defendant Sir William Dillon.

They insisted, on the first point, that the words of the power clearly applied only to a future marriage; that though prospective language might be held to extend to past events as well as future, it was

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(*a*) 1 M. & S. 124.

(*b*) 2 Ves. sen. 500; S. C. Am. 237.

(*c*) 1 Eden, 124.

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so only where the intent of the person using the language plainly required it; that the intention here was not such, for the object was to enable the respective tenants for life to procure wives with suitable fortunes by the power to give adequate jointures; that "may" not only imports futurity, but contingency, and could not therefore apply to a marriage past and certain; that as the jointure was to be in bar of dower, it could not plainly apply to a past marriage; and if it were the intention of the testator that the power should be exercisable in favour of the plaintiff, he would have so provided. On the second point they contended that the fund to which the plaintiff was entitled was not realised at the time of her marriage; that it was uncertain what it might amount to; that it never was "received" by the husband, having been settled to the wife's separate use; and that the legacy received by Sir Arthur Dillon previous to the second settlement was not a "marriage portion" so as to support the exercise of the power. They cited *Baldwin v. Roche* (a).

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Judgment.

THE LORD CHANCELLOR.

In this case the plaintiff has filed her bill for the purpose of raising the arrears of her jointure which she claims to be entitled to under one or both of two deeds executed in 1841 and 1844, purporting to be in exercise of a jointuring power given by the will of the late Sir Charles Drake Dillon. That power authorised the successive tenants for life of the estates devised to charge them with a sum not exceeding £500 per annum for their wives.—[His Lordship read the words of the power.]

The plaintiff had intermarried with the late Sir Arthur Richard Dillon, long previous to the will of the testator, who died in 1838. Two questions have been raised by the defendant Sir William Dillon in bar of the plaintiff's right to this jointure. First, he insists that she could not be the object of the power to jointure, inasmuch as that power could by the terms in which it is framed be only

(a) 5 Ir. Eq. Rep. 110.

exercised in favour of a wife married by a tenant for life subsequent to the making of the will; and secondly, even supposing that the power could be held to apply to the case of a lady married before the date of the will, still that as Sir Arthur had not, at the time when he purported to charge the jointure under the power of appointment, actually received any sum of money as a portion with his wife, that charge was not a valid appointment according to the preliminary requisites of the will.

With respect to the first of these points, I think it is one of considerable difficulty. It is true that words which are properly referrible to future acts may be so construed as to include past acts, as laid down in relation to the words *procreatis* and *procreandis* in *Co. Lit.* (a), and in the case of *Doe d. James v. Hallett* (b). The clear intention of the instrument there required this forced construction to be put upon the language. From the will in this case however, I am not able to collect such an intention as would in my mind justify the Court in putting upon the words any construction different from the meaning which they naturally bear—namely, that the jointuring power could only be exercised in favour of wives married subsequent to the will, though it might be exercised either before or after such a marriage was contracted. The principal object of the testator appears to me to have been, in conferring this power of jointuring, to enable the person who was for the time being in possession of the estates and title to obtain in marriage a lady with a fortune suitable to his means and rank; and that no person who should bear the name of Lady Dillon should be left without a provision and establishment befitting her station and the fortune she should bring. I think that the language of the will generally confirms this as being the testator's intention. Now, in the absence of all authority, I would find it difficult to hold, where the testator has used words studiously referring to a future event, as well in the power as in the clause relating to the portions for younger children, that the plaintiff, who could not have married upon the faith of the provisions of this will, should have its language

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(a) *Co. Lit.* 20, b.

(b) 1 M. & S. 124.

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strained to include her case. My present impression therefore upon this first branch of the case is against the claim of the plaintiff. I shall however look into the authorities, and if I find any which lead my mind to a different conclusion I shall mention them.

As to the second question, if I have come to a right conclusion upon the first point, it will be unnecessary for me to give any decision upon it. At the same time my present impression is, that even if the plaintiff, notwithstanding her having been married before the testator's death, could be within the scope of the jointuring power, still the settlement of her fortune upon herself for life cannot, according to the language of the power or intention of the testator, be considered such a *receipt* of money by her husband as was contemplated. I conceive that the plaintiff never in point of fact parted with her fortune; but that the way in which it was settled amounted in reality to a retention of it by her or for her use. My present impression is therefore against the bill, and unless that shall be changed I will dismiss it, but under the circumstances without costs.

Dec. 23. I expressed my opinion in this case at the close of the argument. The bill must be dismissed; but as costs were not pressed against the plaintiff, and the question is novel and depended on the construction of the instrument under which all parties claimed, let it stand dismissed without costs, generally. If Lady Dillon has gone into proof respecting the mock transfer of £3000 in the pleadings mentioned,* she must pay all those costs. She must of course also pay the costs of her own trustees, if made parties to the suit, and of any other parties defendants whose costs ought not to be borne by the principal defendant.

Reg. Lib. 98, fol. 53, 1847.

* The facts connected with this transfer did not affect the questions decided.

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Rolls.

EYRE LLOYD and ANNE LLOYD, otherwise MASSEY,
his Wife,

v.

MASSEY HUTCHINSON MASSEY and others.

(*In the Rolls.*)

Nov. 5, 12,
21, 25.

This case was set down for argument upon a demurrer for want of equity taken to the plaintiffs' bill by the defendant Massey Hutchinson Massey.

The bill prayed that it might be referred to the Master to take an account of the sum due for principal and interest on foot of a sum of £15,000, charged upon certain lands in the bill mentioned, by a deed of marriage settlement, bearing date the 15th day of May 1804, and executed in contemplation of the marriage of Hugh Massey and Alice O'Donnell the elder, the father and mother of the plaintiff Anne Lloyd; and also to take an account of the sum due to Eyre Lloyd for interest thereon; and also an account of all incumbrances affecting the lands, and that in default of payment of the

Lands were conveyed by marriage settlement to trustees for nine hundred and ninety-nine years, upon trust during so many years of the term as A. should live to pay the rents to her, or as she should appoint, and subject to a charge of £10,000 to pay to H. for so many years as he should live after the de-

cease of A., an annuity of £1000, and to pay the residue of the rents as A. should by deed or will appoint; and as to the residue of the term after the decease of A. and H., it was declared that the same was limited in trust that if there should be younger children of the marriage the trustees should by sale or mortgage of the residue of the term, and by the rents and profits thereof in the meantime, and until such sale, raise the sum of £15,000 for the portions of such younger children, the portions to be paid to sons at twenty-one, and to daughters at twenty-one or marriage, and should, out of the rents in the meantime, and until the portions be payable, raise such yearly sums for the maintenance and education of the younger children as A. should deem meet, not exceeding the interest of the respective portions at the rate of £5 per cent. Provided, that if any of the children should die before his portion should become payable, it should be divided among the survivors. A. died, and a bill having been filed to raise the principal and interest of the £15,000—

Held, 1.—That the Court had no power under the settlement to direct a sale of the term in possession during the life of H.

2.—That the Court could not sell so many years of the term as should be unexpired at the death of H., as the security of the prior charges would thereby be impaired.

3.—That interest was payable on the £15,000 from the death of A., and during the life of H.

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sum which should be found due for principal and interest, within a time to be fixed by the Court, the residue of the trust term of nine hundred and ninety-nine years in the lands upon which the £15,000 was charged by the said settlement, or a competent part thereof, or such estate therein as to the Court should seem fit, might be sold under the decree of the Court; and that out of the money to arise from such sale the said sum of £15,000 and all prior incumbrances might be paid according to their priorities, and a receiver.

The bill stated that Alice Hutchinson being seised in fee of certain lands in the bill mentioned, by deed of marriage settlement bearing date the 10th of October 1798, executed on her marriage with Hugh O'Donnell her first husband, conveyed the said lands to trustees and their heirs to the use of herself for life, with remainder to trustees for five hundred years, in trust to raise two sums of £5000 for the portions of the younger child or children of the then intended marriage, and in default of issue male of the marriage to the said Alice in fee.

The marriage took place, and there was one child Alice O'Donnell the younger. Hugh O'Donnell died, leaving his widow the said Alice O'Donnell the elder him surviving, who afterwards married Hugh Massey one of the defendants; and by deed, executed on the marriage, bearing date the 15th of May 1804, after reciting that Alice O'Donnell the elder was seised in fee of the said several lands charged with the two sums of £5000 for Alice O'Donnell the younger, Alice O'Donnell the elder conveyed the same to trustees to the use of Edward Synge Townsend and John Moore, their executors and administrators, for the term of nine hundred and ninety-nine years, upon trust that they should, yearly and every year during so many years of the term as Alice O'Donnell the elder should live, pay over the rents and profits of the lands to her, or to such person as she should notwithstanding her coverture appoint; and from and after her decease, upon trust to raise and levy by sale or mortgage the said two sums of £5000 for Alice O'Donnell the younger, daughter of Alice the elder, to be paid to her at her age of twenty-one years or day of marriage, whichever should first happen, with interest at £5 per cent. from the death of her mother; and subject

to the said charge, to pay yearly and every year during the residue of the term out of the issues and profits of the lands unto Hugh Massey and his assigns, for so many years as he should live after the decease of Alice O'Donnell the elder, the yearly sum of £1000, payable on the 1st of May and 1st of September, with power of distress in case the same should be in arrear. And as to the residue of the rents and profits of the lands, to pay the same to such person or persons in such manner and at such times as Alice O'Donnell the elder should by deed or will, notwithstanding her coverture, direct or appoint; and for want of such appointment, then to the right heirs of Alice O'Donnell the elder. And "It was further agreed by the parties to the said deed that the said Edward S. Townsend and John Moore should, out of the rents and profits of the lands, pay to Miss Charlotte O'Donnell the sum of £500, to be payable on her day of marriage or the death of the said Alice, whichever should first happen. And as to the residue of the said term of nine hundred and ninety-nine years after the death of the said Alice O'Donnell the elder and Hugh Massey, the same was thereby limited to the said E. S. Townsend and John Moore, and to the survivor of them and the executors, &c., of such survivor, upon the several trusts, and to and for the several uses, intents and purposes therein mentioned." And after the determination of the said term of nine hundred and ninety-nine years, and subject thereto, to the use of the first and other sons of the said Hugh Massey, on the body of the said Alice O'Donnell his then intended wife, in tail male. "And as for and concerning the residue of the said term of nine hundred and ninety-nine years so limited to the said E. S. Townsend and J. Moore, their executors, &c., it was thereby declared and agreed that the same was so limited to them upon trust, and to and for the intents and purposes, that in case there should be issue of the intended marriage one or more child or children, other than an eldest or only son, the said E. S. Townsend and John Moore, and the survivor of them, or the executors, &c., should by sale or mortgage of the residue of said term of nine hundred and ninety-nine years, or a competent part thereof, and by the rents and profits thereof in the meantime and until such sale, raise and levy the sum of £15,000, to be for the

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portions of such child or children (other than and except the eldest or only son), and if only one such child, then said sum of £15,000 to be paid to such child, and in case there should be more than one such child said sum of £15,000 to be paid to such children respectively, at such time and times, and in such shares and proportions, and with such yearly interest in the meantime, not exceeding the legal interest of the said sum of £15,000, as the said Alice O'Donnell the elder, party to said deed, by any deed under hand and seal attested by two or more credible witnesses, or by her last will and testament, in like manner to be attested, should direct, limit or appoint, and in default of such direction or appointment, to be paid to and amongst such younger child or children, if more than one, equally share and share alike; the portion or portions of such younger child or children, if a son or sons, to be paid to him or them at their respective ages of twenty-one years, and if a daughter or daughters, to be paid to her or them at their respective ages of twenty-one years or day or days of marriage, whichever should first happen; and should by and out of the said rents and profits of the said premises so limited to them the said E. S. Townsend and John Moore, for the term of nine hundred and ninety-nine years, in the meantime and until the said portion or portions should respectively become payable, raise and levy such yearly sum and sums of money for the maintenance and education of such younger child or children as the said Alice O'Donnell the elder should deem meet, not exceeding the interest of the said respective portions at the rate of £5 per cent. by the year, and if no appointment by the said Alice, then at the rate of £5 per cent. by the year. Provided that if any of said children should happen to die before his or their portion or portions should become payable, then the portion and portions of him or them so dying should go and be paid to, and be equally divided amongst, the survivors or survivor of them, at such time as the original portions of such child or children should become payable."

The bill then stated the marriage of Hugh Massey with Alice O'Donnell the elder, and that there were two children only of the marriage, namely, the plaintiff Anne Massey, now the wife of the plaintiff Eyre Lloyd, and the defendant Massey Hutchinson Massey, who took the demurrer to the bill.

The bill then stated that, before the birth of either of the plaintiff Anne or the defendant M. H. Massey, Alice O'Donnell the elder, then Alice Massey, made her will duly attested, dated the 25th of April 1806, by which, after reciting the settlement of 1804, she appointed the residue of the rents and profits of the said lands (after the payment of the interest of the said sum of £10,000, and after payment of the said sum of £1000 a-year to Hugh Massey, her husband, to be paid to the said John Moore and Edward Townsend, and the survivor and the executors, &c., during the life of Hugh Massey, upon trust to pay the legacies thereafter particularly mentioned (which had been since fully paid), and she appointed the residue of the rents and profits of the lands and premises, after payment of the said annuities and legacies, unto the said John Moore, upon trust for the use and benefit of her son, in case she should have any, and in trust to deliver over to her son, in case she should have one, the said rents and profits at the age of twenty-one years, and appointed Hugh Massey and John Moore executors of her will.

The bill then stated the death of Alice Massey, otherwise O'Donnell, the marriage of the plaintiffs, Eyre Lloyd and Anne Massey, and a settlement which appeared to have been post-nuptial and executed under the direction of one of the Masters of the Court, and by which the said sum of £15,000 was assigned to trustees in trust to pay the interest of it to Eyre Lloyd for life, and after his decease to pay £500 a-year to the plaintiff Anne for life, and to permit the surplus of the interest to accumulate; and after the decease of the survivor, upon trust to pay over the principal and all accumulations, &c., to the children of the marriage as Eyre Lloyd should appoint, and in default of appointment equally, and in default of children and their issue, to the survivor.

The defendant M. H. Massey demurred to the bill, and stated as cause, that the plaintiffs had not by their bill made a case which entitled them to any discovery or relief from or against the defendant, touching the matters contained in the said bill, or any of such matters; and that any discovery which could be made by the defendant, touching the matters complained of in the said bill, or any of them, could not be of any avail to the said plaintiffs for any of the

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purposes for which a discovery was sought against the defendant, nor entitle them to any relief touching the matters therein complained of; and that the said bill did not embrace the whole of the plaintiff's claim.

Argument.

Mr. *Exham* and Mr. *Lane*, in support of the demurrer, argued that on the true construction of the settlement, the charge being secured on the residue of the term, neither principal nor interest could be raised during the lifetime of Hugh Massey; for the Court could not sell the residue of the term which would remain after the decease of Hugh Massey; by doing so, the Court would impair the security of the charges prior to the charge of £15,000. They distinguished *Codrington v. Foley* (a), and *Lord Miltown v. Trench* (b), as cases of reversionary terms, and relied on *Churchman v. Harvey* (c) and *Pennefather v. Bury* (d).

Mr. *E. Blackburne* and Mr. *Christian*, contra, argued that it was the plain intention of the settlement that both principal and interest should be raised immediately after the death of Alice Massey; that the portions were vested at her death, and therefore raisable then, according to the general rule of law; that the clause of the settlement giving the portions should precede the power of appointment of the residue, otherwise legatees and volunteers would be preferred to purchasers for value; and the Court had power to transpose and reform the clause; that the Court might decree a sale of the term, subject to the annuity to Hugh Massey; at all events the interest was payable, and the demurrer therefore too large. They cited *Uvedale v. Halfpenny* (e); *Fenton v. Fenton* (f); *Corbett v. Maidwell* (g); *Sandys v. Sandys* (h); *Codrington v. Foley* (i); *Lord Miltown v. Trench* (k); *Smyth v. Foley* (l); *Lyddon v. Lyddon* (m).

(a) 6 Ves. 364.

(b) 4 Cl. & Fin. 276; S. C. 11 Bli. N. S. 1.

(c) Amb. 335.

(d) 9 Ir. Eq. Rep. 590.

(e) 2 P. Wms. 150.

(f) 1 Dr. & W. 76.

(g) 1 Salk. 159.

(h) 1 P. Wms. 706.

(i) 6 Ves. 364.

(k) *Ubi sup.*

(l) 3 Y. & C. Exch. 142.

(m) 14 Ves. 558.

The MASTER OF THE ROLLS (after going through the statements in the bill) said :—

Two questions arise on the construction of the settlement of 1804 ; first, whether the principal sum of £15,000 can be raised during the lifetime of Hugh Massey ? secondly, whether, if the principal sum be not now raisable, the plaintiff Eyre Lloyd is entitled to be paid the interest on that sum during the lifetime of Hugh Massey ?

As to the first question, it has been contended by the plaintiffs' Counsel that the £15,000 should be now raised by a sale of the trust term of nine hundred and ninety-nine years in possession, subject to the trusts prior to the charge of £15,000

I am of opinion that the Court has no power under the settlement of 1804 to direct a sale of the trust term in possession during the lifetime of Hugh Massey.

By the settlement of 1804, executed on the marriage of Alice O'Donnell the elder with her second husband Hugh Massey, she assigned the lands of which she was seised to the use of trustees for a term of nine hundred and ninety-nine years, upon trust, first, to pay the rents and profits to her for her separate use during so many years of the term as she should live ; secondly, from and after her decease to raise by sale or mortgage the two sums of £5000 for Alice O'Donnell the younger, her daughter by her first marriage ; thirdly, subject to said charge to pay yearly, during the residue of the said term, out of the issues and profits of the said lands, unto Hugh Massey, for so many years as he should live after the decease of the said Alice O'Donnell the elder, the yearly sum of £1000 ; fourthly, as to the residue of the rents and profits of the said lands (that is during the lifetime of Hugh Massey), to pay the same to such person or persons, and in such manner and at such times as the said Alice O'Donnell the elder should by deed or will, notwithstanding her coverture, direct, or appoint, and in default of appointment then to her right heirs. Then after a direction to the trustees to pay a sum of £500 to Miss Charlotte O'Donnell (which has been paid), the deed provides that "as to the *residue* of the said term of nine hundred and ninety-nine years after the death

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of the said Alice O'Donnell and Hugh Massey, the same was thereby limited to the trustees upon the trusts and for the several purposes thereafter mentioned."

The deed then (after limiting the estates subject to the term of nine hundred and ninety-nine years to the first and other sons of the intended marriage in strict settlement), declares the trusts, "as for and concerning the *residue* of the said term of nine hundred and ninety-nine years." Those trusts were, that in case there should be any child or children other than an eldest son, the trustees should by sale or mortgage of "the *residue* of said term of nine hundred and ninety-nine years, or a competent part thereof" (*i. e.* the residue of said term of nine hundred and ninety-nine years after the death of Alice O'Donnell and Hugh Massey, as stated in the previous clause), "and by the rents and profits thereof in the meantime raise and levy the sum of £15,000, to be for the portions of such child or children other than an eldest or only son."

It appears, therefore, to be clear that the power to the trustees to raise the £15,000 is only by sale or mortgage of the "residue of the said term of nine hundred and ninety-nine years after the death of Alice O'Donnell and Hugh Massey," and consequently that the Court has no power to direct a sale of the trust term in possession during the lifetime of Hugh Massey.

It has, however, then been contended by the plaintiffs' Counsel that the plaintiffs are entitled to have the £15,000 now raised (although Hugh Massey is still living) by a sale of the residue of the term; that is, by a present sale of so many years of the term as may be unexpired upon the death of Hugh Massey; and it has been argued that this case is governed by the decisions of *Codrington v. Lord Foley* (a), *Smyth v. Foley* (b), and cases of that class.

In the latter case it was decided, in accordance with many authorities, where, under a marriage settlement, lands were limited to the use of the intended husband for life, remainder to the wife for life, remainder to trustees for five hundred years upon trust to raise portions for the younger children at twenty-one, by sale or mortgage

(a) 6 Ves. 364.

(b) 3 Y. & C. Exch. 142.

of the term, remainder to the first and other sons of the marriage in tail, that the younger children, all of whom had attained twenty-one, were entitled to have the portions raised by a sale or mortgage of the term during their father's lifetime.

Lord Eldon, in the prior case of *Codrington v. Foley*, after referring to the cases, states that, "Upon this general state of the doctrine of the Court, it appears to me that the raising or not raising must depend upon the particular penning of the trust and the intention of the instrument;" and he afterwards adds: "The rule upon the whole depends upon this, whether it was the intention of the parties to the instrument, attending to the whole of it, that the portions should or should not be raised in this manner; taking it *prima facie* to be the intention, upon the general rule, if there is nothing more than a limitation to the parent for life, with a term to raise portions at the age of twenty-one or marriage; if there is nothing more and the interests are vested, and the contingencies have happened at which the portions are to be paid, the interest is payable and the portions must be raised in the only manner in which they can be raised, that is, by sale or mortgage of the reversionary term."

If these cases had any application to the present, it might be sufficient to state that, I think, upon the true construction of the settlement of 1804, it was not the intention of the parties that the £15,000 should be raised during the lifetime of Hugh Massey. But it appears to me that *Codrington v. Foley*, and that class of cases, have no application to the present case.

If the Court was to set up for sale in this case so many years of the term of nine hundred and ninety-nine years as should be unexpired at the death of Hugh Massey, and compelled the trustees of the term to convey such interest, what would be the consequence? The estate or interest which would remain in the trustees would no longer be the term of nine hundred and ninety-nine years, but only so many years of the nine hundred and ninety-nine years as Hugh Massey should live. Hugh Massey has a rent-charge of £1000 a-year issuing out of the lands, secured by that trust term. There are other trusts prior to the charge of £15,000, which the term was

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created to secure. What authority can the Court have to cut down the nine hundred and ninety-nine years' term created to secure the rights of the parties to the deed, whose claims are prior to the plaintiffs', to a term for so many years as Hugh Massey shall live, and thus to affect the rights of Hugh Massey and those other persons?

I do not see, if a decree for a sale of so many years of the nine hundred and ninety-nine years as should be unexpired at the death of Hugh Massey were now made, how title could be made out, unless the Court, regardless of the rights of the parties having charges on the estate prior to the plaintiffs', should compel the trustees of the term to convey.

"The term of nine hundred and ninety-nine years is," as Lord Plunket observed in *Lord Miltown v. Trench (a)*, "not a reversionary term, nor could a reversionary term be carved out of it. It is a present and paramount term." And it appears to me that during the life of Hugh Massey, no portion of the term can be sold to raise the £15,000.

The second question in this case is, whether, if the principal sum of £15,000 be not now raisable, the plaintiff Eyre Lloyd is entitled to be paid the interest on said sum during the lifetime of Hugh Massey? The settlement of 1804 is very inaccurately drawn, and there is considerable difficulty in this second question.

It has been argued on the part of the defendant, that if the principal sum of £15,000 is not to be raised until after the death of Hugh Massey, the interest is not payable until then, as interest is only payable on account of delay in paying that which is due and payable; and it has been further contended, that even if interest is payable on the £15,000, it cannot be raised until after the death of Hugh Massey.

The general rule may be that interest is only payable on account of delay in paying that which is due and payable. But the question must depend upon the construction to be put on the settlement. In the case of *Lyddon v. Lyddon (b)* a trust term was created by marriage settlement immediately expectant on the father's death, subject

(a) 4 Cl. & Fin. 321.

(b) 14 Ves. 558.

to a jointure to the mother; the trusts of which were, by sale or mortgage to raise portions for younger children at twenty-one, if after the death of both parents, and by such ways and means as the trustees should think fit to raise interest for maintenance until the portions should become payable. The father died leaving the mother surviving. The principal of the portions was not raisable until after the death of the mother; but it was held upon the construction of the instrument that interest was due from the death of the father in the minority of the children, the mother surviving. Sir W. Grant in that case said:—"Where the trustees have the legal right to the rents and profits, and interest is expressly given for maintenance until the portions shall become due and payable, it would be equally contrary to the words and the spirit of the settlement to hold that the maintenance should not take place until after the death of the mother."

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The authority of *Lyddon v. Lyddon* was recognised by Lord Cottenham in the House of Lords in *Lord Miltown v. Trench (a)*. The question therefore is, whether it sufficiently appears upon the settlement of 1804, that interest was payable on the £15,000 prior to the death of Hugh Massey.

The deed, after the provisions which I have already stated, which authorise the raising of the £15,000 out of the residue of the term of nine hundred and ninety-nine years after the death of Alice and Hugh Massey, and after providing that, in default of appointment by Alice Massey, the said sum should be paid to and amongst the younger child or children, if more than one, share and share alike, the portion or portions to be paid to a son or sons at twenty-one, and to a daughter or daughters at twenty-one or marriage, proceeds thus:—"That the trustees "should, out of the said rents and profits of the said premises so limited to them for the term of nine hundred and ninety-nine years, in the meantime, and until the said portions should become payable, raise and levy such yearly sum or sums of money for the maintenance and education of such younger child or children as the said Alice O'Donnell should deem meet, not exceed-

(a) 4 C. & Fin. 312.

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ing the interest of the said respective portions at the rate of £5 per cent., and if no appointment, then at the rate of £5 per cent."

The provision is not that the trustees should, out of the rents and profits of the residue of the term after the death of Alice and Hugh Massey, raise a sum for maintenance; but that the trustees should, out of the rents and profits so limited to them for a term of nine hundred and ninety-nine years, in the meantime and until the portions should become payable, raise such sum for the maintenance and education of the child or children as Alice Massey should deem meet, and if no appointment, then at the rate of £5 per cent.

If Alice Massey had died during the minority of the plaintiff Mrs. Lloyd, and had by her will directed maintenance to be paid from and after her decease, I apprehend she was empowered so to do.

The settlement provides, that if she shall not appoint maintenance, it shall be payable at £5 per cent. According to the case of *Wynter v. Bold*, the power of appointment in Alice Massey shows that it was not the intention that interest should be payable during her life; but I think upon the whole that it was the intention that maintenance should be payable after her death, although the principal could not be raised until the death of Hugh Massey.

If maintenance would have been payable after the death of Alice Massey, if she had died during the minority of Mrs. Lloyd, I think interest was payable after Mrs. Lloyd attained her age.

With respect to the power of appointment given by the settlement to Alice Massey to appoint the surplus rents and profits during the lifetime of Hugh Massey, the settlement must be construed exactly in the same manner as if she had exercised the power in favour of a stranger to the marriage consideration, instead of appointing to her eldest son. If she had done so, such appointee could not, I think, have successfully contended that it was the intention of Alice Massey, whose estates were settled, or of her then intended husband Hugh Massey, that in the event of her dying in the lifetime of Hugh Massey, the younger child or children should be left totally destitute of provision during his lifetime.

If the £15,000 bears interest at all prior to the death of Hugh Massey, it was not, in my opinion, the intention that it should accu-

mulate against the inheritance; and the defendant who has taken the demurrer, and who is the remainderman, would strongly have contended against such construction if the surplus rents during the lifetime of Hugh Massey had been appointed to a stranger.

Upon the whole, I think it was the intention that the £15,000 should bear interest after the death of Alice Massey, and during the lifetime of Hugh Massey, although the principal sum was not raisable until the death of the latter; and if it did bear interest, I think the interest was payable during the lifetime of Hugh Massey, and that it was not intended that it should accumulate against the eldest son the remainderman who has taken the demurrer. In the case of *Lord Miltown v. Trench (a)*, Lord Plunket said:—"The authorities which have been cited at the Bar as to legacies payable in the event of the legatees attaining twenty-one, or of marriage, do not apply, nor have the cases as to the power of raising legacies or portions out of a reversionary term any application to the subject. This is not a reversionary term, nor could a reversionary term be carved out of it; it is a present and a paramount term: and the case is in my opinion nothing more than the ordinary one of a tenant for life called on to keep down the interest of a paramount charge on the inheritance, that charge in its nature carrying interest. It would require an intention to the contrary clearly appearing on the will to counteract this general rule."

In the same case (p. 313) Lord Cottenham, after having adverted to the authorities, said:—"Looking therefore at the various events which the testator contemplated—looking at the absurdity of holding that the interest is to be raised and is to accumulate against the inheritance when the remainderman should be in possession of the estate, and considering the authorities which have been cited upon this subject, though it is not perhaps possible to make every part of this will reconcilable with other parts—I think your lordships will concur with me in the opinion which I have very distinctly formed, that you will be carrying the testator's intention more certainly into effect by affirming the decree of the Court below than you can do by any variation of it."

(a) 4 Cl. & Fin. 321.

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If interest is payable at present on the charge of £15,000, the demurrer ought to be overruled as covering too much.

It is right, however, to observe that a technical difficulty might be suggested which has not been raised in the course of the argument:—The interest is payable to Mr. Lloyd under his marriage settlement, and if the principal is not now recoverable, it might be contended that there has been a misjoinder, Mrs. Lloyd having been joined as a co-plaintiff. Having, however, suggested this difficulty after the argument had closed, I understood from the defendant's Counsel that the demurrer was taken in order to raise the question of substance between the parties, and that there was no desire that the case should be decided on a technical ground.

Understanding therefore that the technical objection is not raised by the defendant's Counsel, I shall overrule the demurrer with costs.

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On a subsequent day the question of misjoinder was argued by—

Mr. *Christian*, for the plaintiff, who relied on the settlement being post-nuptial, and cited *Ellison v. Elwin* (a); *Ashly v. Ashly* (b); and by—

Mr. *Lane*, for the defendant, who contended that the plaintiffs had conflicting interests, as it was not stated in the bill that the wife had confirmed the settlement, and it must therefore be taken most strongly against the plaintiffs that she had not confirmed it.

The MASTER OF THE ROLLS thought that the technical objection of misjoinder was answered, and that the Court was not bound to allow the demurrer, on the ground of Mrs. Lloyd being joined as a co-plaintiff.

(a) 13 Sim. 309.

(b) 1 Col. 553.

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AN order was made in this cause on the 5th of March 1846, giving liberty to Daniel Callaghan to file a charge and obtain a separate report at his own expense on foot of two judgments obtained in the Queen's Bench in Michaelmas Term 1810, for £533. 8s. each. The judgments were revived in 1845 and 1846, the writs of *scire facias* having issued on the 5th of October 1844. The charge was filed on the 7th of April 1846. The Master, under the circumstances stated in the judgment, reported the amount of the penalties of the judgments. Two objections were taken to the report by the defendant Morty O'Sullivan, a minor, who represented the inheritance. The first objection was, that the Master ought to have found that the principal sums only, secured by the said judgments respectively, and interest thereon from the 7th of April 1840, being a period of six years next before the filing of the charge of the said Daniel Callaghan in this cause, were then due on foot of the said judgments respectively. The second objection was, that the Master ought to have found that the principal sums only, secured by the said judgments, and interest thereon from the 15th of October 1838, being a period of six years next before the issuing of the two writs of *scire facias* in the report mentioned, were due on foot of the said two judgments respectively.

Mr. Rogers moved to vary the Master's report.

He contended that Daniel Callaghan was entitled to six years'

was procured from the Registrar's office by his solicitor. He filed a charge in April 1846, and the Master reported him entitled to interest amounting to the penalty of the judgments. On objections to the report, the Court, following *Berrington v. Evans* (1 Y. & C. Exch.), and *O'Kelly v. Bodkin* (3 Ir. Eq. Rep.), *Held*, that the suit and decrees did not save the bar of the Statute of Limitation (3 & 4 W. 4, c. 27, s. 42), and—

Held also, that the "action or suit" by which the arrears of interest "shall be recovered" under sec. 42, was the charge filed in the cause, and not the *scire facias*; and therefore that the party was entitled to six years' interest from the filing of the charge only.

Judgments of 1810 revived in 1845 and 1846 on *sci. fa.* sued out in October 1844. Bill filed in 1823, and decrees in 1834 directing an account of incumbrances and for a sale, in 1836. After an order of reference to allocate the funds, the person entitled to the judgments obtained leave to prove them, and make up a separate report, on an affidavit stating that he never was informed of the existence of the suit or the decrees, or that one of the decrees enabled the creditors to prove thereunder until very lately, and that he was not aware of the scope and effect of the decree until a few days before, when a copy

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interest only, and cited *Henry v. Smith* (a); *O'Kelly v. Bodkin* (b); *Berrington v. Evans* (c).

Mr. *Deasy*, for the Master's report, contended that the pendency of the suit and the decrees took the case out of the operation of the Statute of Limitations (3 & 4 W. 4, c. 27, s. 42), relying on *Paddon v. Bartlet* (d); *Peyton v. M'Dermott* (e); *O'Kelly v. Bodkin* (f); *Lord St. John v. Boughton* (g).

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THE MASTER OF THE ROLLS.

In this case two objections have been taken to the Master's report.

The facts of the case are as follow:—In Michaelmas Term 1810, Daniel Callaghan the elder recovered two judgments in the Court of Queen's Bench against Morty O'Sullivan, each for the sum of £533. 8s. late currency. Daniel Callaghan the younger, son of Daniel Callaghan the elder, is now his personal representative. On the 11th of April 1823, a settlement was executed on the marriage of Morty O'Sullivan with his second wife Ellen O'Sullivan, by which certain lands of which he was seised and possessed were settled upon certain trusts therein stated. Morty O'Sullivan died in the year 1825, intestate, leaving Ellen O'Sullivan his widow, and John O'Sullivan his eldest son by a former marriage him surviving. Ellen O'Sullivan took out letters of administration to the said Morty O'Sullivan.

Emanuel Hutchins filed the bill in this cause on the 26th of May 1826, against John O'Sullivan and Ellen O'Sullivan, to recover the amount of a certain award, together with certain arrears of rent in the bill mentioned; and the bill charged that the settlement of the 11th of April 1823 was fraudulent, and prayed amongst other things, that it might be declared fraudulent and void, and that an account might be taken of what was due to the plaintiff, and

(a) 2 Dr. & War. 381; S. C. 4 Ir. Eq. Rep. 502.

(b) 3 Ir. Eq. Rep. 390.

(c) 1 Y. & Col. Exch. 434.

(d) 3 Ad. & El. 884.

(e) 1 Dr. & W. 198.

(f) *Ubi sup.*

(g) 9 Sim. 219.

also of all the other debts which were owing by the said Morty O'Sullivan at the time of his death, and which then remained unpaid. The cause came on to be heard on the 27th and 28th of May 1834, and it was ordered and decreed amongst other things, that the deed of settlement of the 11th of April 1823 should be deemed fraudulent and void against the plaintiff and the other creditors of the said Morty O'Sullivan, save so far as related to the yearly sum of £100 a-year, thereby provided for the said Ellen O'Sullivan; and it was further ordered, that all creditors of Morty O'Sullivan, and all persons having debts, charges and incumbrances affecting his estates and property, should be at liberty to come in before the Master in said cause and prove and ascertain the same. On the 4th of January 1836, the Master made his report, whereby the demand of the plaintiff and of three other persons were reported. On the 26th of January 1836, there was a final decree for a sale of the lands therein mentioned; under that decree certain lands were sold. On the 4th of December 1845, a reference was made to the Master to allocate the funds. What has led to the delay in the prosecution of this cause does not appear. On the 8th of February 1846 (pending the reference before the Master), a notice of motion was served by the said Daniel Callaghan, the personal representative of Daniel Callaghan the elder, that he might be at liberty to file a charge on foot of the said two judgments, and obtain a report at his own expense, whether any and what sum was due to him on foot of said judgments; and that if the Master should find that any sum was due to him on said judgments, that he should report the priority of the said demands, and include them in his allocation report.

The affidavit of the said Daniel Callaghan, on which the motion was grounded, stated the facts already detailed; and it further stated that he did not come in and prove his claim under the decree in this cause; "for he saith that he was not made a party in this cause, and received no notice whatsoever of the proceedings therein, and saith that from the year 1830 he was a Member of Parliament, and up to about two years ago, during the Parliamentary Sessions of each year was in constant and close attendance on his Parliament-

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ary duties in London, and saith he never heard or was informed of the existence of the cause of *Hutchins v. O'Sullivan*, or of the decrees therein, or any of them, or of any thing whatsoever touching or relating thereto, until long after the date of the said final decree, about eighteen months ago, when this deponent was for the first time informed that such a suit was in existence; but deponent did not then hear or learn, nor did he hear or learn until very lately, that one of the decrees in said cause enabled the creditors of said Morty O'Sullivan to prove thereunder."

The affidavit then stated the issuing of writs of *scire facias* on the two judgments, on the 5th of October 1844, at the suit of the said Daniel Callaghan the younger, against the defendant John O'Sullivan, the heir of Morty O'Sullivan, and that pleas of payment and the Statute of Limitations having been put in, judgments of revival were obtained. It appears from the Master's report that judgment of revival was entered on one of the judgments in Michaelmas Term 1845; and on the other on the 23rd of April 1846. The affidavit then stated that the said Daniel Callaghan was not aware of the scope or effect of the decrees to account of the 27th of May 1837, until within the last few days, when a copy of the same was procured from the Registrar's office of this Court by his solicitor. The affidavit then stated the amount due on foot of the judgment.

An order having been made on the 5th of March 1846, giving liberty to the said Daniel Callaghan to file a charge and obtain a separate report at his own expense, the Master made his report under that order on the 19th of June 1847, by which he has reported the penalties of the said two judgments due to Mr. Daniel Callaghan; and two objections have been taken to the report on the part of the defendant Morty O'Sullivan a minor.

The first is, that the Master ought to have found that the principal sums only, secured by the said judgments respectively, and interest thereon from the 7th of April 1840, being a period of six years next before the filing of the charge of the said Daniel Callaghan in this cause, are now due on foot of the said judgments respectively; and the second objection is, that the Master

ought to have found that the principal sums only, secured by the said judgments, and interest thereon from the 5th of October 1838, being a period of six years next before the issuing of the two writs of *scire facias* in the report mentioned, are due on foot of the said two judgments respectively.

The charge was filed on the 7th of April 1846, and the writs of *scire facias* issued as already stated on the 5th of October 1844.

It appears to me that the Master was mistaken in reporting that the penalties of the judgments were due to Mr. Callaghan.

The case of *O'Kelly v. Bodkin* (a) is, in my opinion, not distinguishable from the present case. In that case the original bill was filed in October 1832, that is, prior to the passing of the 3 & 4 W. 4, c. 27. The decree to account was pronounced on the 23rd of June 1835, and the Chief Remembrancer made his report on the 1st of November 1838. In June 1840, a person of the name of T. Browne applied to the Court that he might be at liberty to come in before the Chief Remembrancer under the decree to account, and prove the amount of a certain judgment obtained against John Bodkin in Easter Term 1808; and in the affidavit upon which the motion was grounded he stated that up to the month of November 1839 he had not heard of and was wholly ignorant of the institution of the suit or the proceedings thereon. An order was made by the Court that he should be at liberty to come in before the Chief Remembrancer and prove the amount due on foot of the judgment, and obtain a separate report at his own expense, without prejudice to any question as to the claim for interest on the judgment, having regard to the late Statute of Limitations or otherwise. The Chief Remembrancer made his report under that order, and there was a special finding in the report, submitting to the Court the question, whether more than six years' interest, prior to filing the charge under the decree, should be reported. The Court of Exchequer decided that only six years' interest prior to the filing of the charge was payable to the judgment creditor.

Baron Pennefather, referring to *Berrington v. Evans*, said:—

(a) 8 Ir. Eq. Rep. 390.

1847.
Rolls.
HUTCHINS
v.
O'SULLIVAN.
Judgment.

1847.
Rolls.
 HUTCHINS
v.
 O'SULLIVAN.
 Judgment.

"The question there was, whether the whole demand of the creditor was barred or not? The only thing relied on to take the case out of the operation of the statute was the pendency of the suit; but the Court determined that inasmuch as the creditor stated that he was not aware of the institution of the suit until after the decree was pronounced, he could not in anywise consider that suit as his own; and being of that opinion, the Court properly refused to allow him to go before the officer and prove his demand." Again, at p. 396, he says:—"In *Berrington v. Evans*, the creditor was wholly barred by the statute unless he could show that the suit was his suit; but here the creditor's demand was not barred *in toto*, whether the suit was considered his or not; and if his application had been refused, he might next day have filed a bill to raise the sum due on foot of his judgment. Therefore the order on this creditor's application does not establish that the suit must be considered his from the beginning. Then when the applicant swears that he never heard any thing about the suit, how can we intend in his favour that he regarded it as his own from the beginning? And we must do that in order to give him the benefit of it; for the ground upon which a suit is considered to be the suit of the creditor proving under the decree in it is, that he lay by and forebore to institute a suit himself, knowing the pending of the other suit." The Chief Baron (the present Lord Chancellor) says:—"The Court are of opinion that the facts stated do not distinguish this case from *Berrington v. Evans*, and that the general question upon the construction of the statute arises."

The only distinction between the case of *O'Kelly v. Bodkin* and the present is, that the right to raise the question of the Statute of Limitations was reserved in the former case in the order giving liberty to the creditor to prove. But the Court of Exchequer did not decide the case upon that ground, but upon the principle upon which *Berrington v. Evans* (a) was decided, namely, that where a judgment creditor applies to prove under a decree after the Master has made his report, and in order to account for the delay swears

(a) 1 Y. & C. Exch. 434.

that he was entirely ignorant of the institution of the suit until shortly before the application, he shall not be at liberty to insist that he is to have the benefit of the suit as his suit from the beginning, so as to prevent the operation of the Statute of Limitations. I am therefore of opinion that the Master should not have reported the penalties to be due on the judgments.

1847.
Rolls.
HUTCHINS
v.
O'SULLIVAN.
Judgment.

There is some difficulty as to whether the interest should be calculated for the six years previous to the 7th of April 1846, being the day of the filing of the charge, as insisted by the first objection, or for the six years previous to the 5th of October 1844, the day on which the writs of *scire facias* were issued; which is the point raised by the second objection.

In the case of *Brady v. Fitzgibbon* (a) it was decided by the late Master of the Rolls that where a receiver was appointed under the Sheriffs' Act, six years' interest was recoverable prior to the issuing of the *scire facias*; but the ground of that decision was, that the appointment of the receiver under that Act was an equitable execution. In the present case, the question is upon the construction of the 42nd section of the Statute of Limitations, which enacts that no arrears of interest shall be recovered by any distress, action or suit, but within six years after the same shall have become due, unless in the cases mentioned in that section.

In the case of *Smith v. Creagh* (b) it was held that the filing a charge was an action or suit within the meaning of the 8 G. 1, the Statute of Limitations relating to judgments then in force. Chief Justice Bushe, in giving judgment, after adverting to the course of proceeding of filing charges under decrees in creditors' suits, stated that "such a proceeding (*i. e.*, filing a charge) is of very common occurrence; and it was not in the course of argument disputed that it would be within the meaning of the statute (8 G. 1) an action or suit, by the creditor coming into the office under the decree, it being clear that a creditor so coming in thereby becomes a party in the nature of a plaintiff, who, as an actor in the suit, is entitled to carry it on to a decree."

(a) 7 Ir. Eq. Rep. 2.

(b) Batty, 408.
57

1847.
Rolls.
 HUTCHINS
v.
 O'SULLIVAN.
 Judgment.

The "action or suit," by which the "arrears of interest shall be recovered" under the 42nd section, is the charge filed in the cause, and not the *scire facias*. The six years mentioned in that section are the six years prior to such "action or suit." I therefore am of opinion that the interest to which Mr. Callaghan is entitled is for the six years previous to the 7th of April 1846, being the day of filing the charge.

In the case of *Henry v. Smith* (a) the bill was filed for a specific performance, and had no relation to the judgment creditor; and the decree for a specific performance referred it to the Master to take an account of all incumbrances affecting the lands at the time of the contract. Sir E. Sugden, in that case, decided that the judgment creditor was only entitled to interest for six years next before the filing of the charge.

In *O'Kelly v. Bodkin* (b) the interest was also calculated for six years next before the filing of the charge; and the same rule should, I think, be applied in this case. I am, upon the whole, of opinion that the first objection must be allowed. I shall make no rule on the second objection.

I observe that the affidavit of Mr. Callaghan is not stated in the schedule of evidence to the Master's report, and probably his attention was not called to the passages in that affidavit which bring this case within the authorities referred to. Allow the first objection with costs; no rule on the second objection.

(a) 2 Dru. & War. 392.

(b) 3 Ir. Eq. Rep. 390.

1847.
Chancery.

KERRISON *v.* REDDINGTON.

(*Chancery.*)

June 4.

THOMAS REDDINGTON, of Rye Hill in the county of Galway, being seised and possessed of considerable real and personal estate, by his last will, bearing date the 11th of September 1822, amongst other dispositions, made the following:—"I give and bequeath unto the representatives of the late mercantile house of Messrs. Alday and Kerrison, that existed in the year 1775, or to such person or persons as are or shall be at the time of my decease entitled to their personal property, a sum of £2200. 14s. sterling, for some debt alleged to be due to them by my said father Michael Reddington; and having doubled the debt so alleged to be due to them, I order the same to be paid without interest in ten years after my decease;" and he charged his real estates in Galway and Mayo with the payment of his debts and legacies. He died in the year 1828.

Prior to the year 1775, Thomas Alday and Roger Kerrison carried on the business of merchants and bankers in the town of Norwich, under the firm of Alday and Kerrison, and, as such, had claims and accounts of long standing with Michael Reddington the testator's father. He died in 1777 without having settled his accounts with the firm (on foot of which they claimed £1100. 7s.), and after his death the testator took out administration to him.

Some time before the year 1775 Thomas Alday died, having by his will bequeathed all the residue of his goods, chattels, stock-in-trade, ready money, debts, and all other his real and personal estate not therein or otherwise disposed of, to his partner Roger Kerrison, whom with his widow he made his executors. They proved the will, and on the widow's death Roger Kerrison became the sole executor and entitled to the debts, &c., as legatee, and he continued to carry on the business solely under the name of Alday and Kerrison; and

A bequest to the representatives of the late mercantile house of A. and K., or to such person or persons as should be entitled at testator's decease to their personal property, in satisfaction of a debt due by the testator's father; *Held*, claimable by the legal representative of the surviving partner, as representing the firm of A. and K., and not by the persons beneficially entitled to the properties of A. and K.

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Chancery.
KERRISON
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TON.
 ———
Statement.

was in the year 1775 the only person who answered the description of "the representatives of the mercantile house of Messrs. Alday and Kerrison," given in the will of Thomas Reddington. Roger Kerrison afterwards became Sir Roger Kerrison, and died in June 1808 intestate, leaving his widow and two children Thomas Alday Kerrison and Mary Kerrison, otherwise Harvey, surviving, who both afterwards died, leaving each several children.

Thomas A. Kerrison, the grandson and one of the next-of-kin of Sir Roger Kerrison, took out administration to him in Ireland in 1844 and filed the bill in this cause to raise the amount of the legacy out of the personal and real estate of Thomas Reddington; and by a decree of the 29th of May 1845 it was referred to the Master to enquire "whether the plaintiff was entitled to the legacy of £2200. 14s., late Irish currency, bequeathed by the will of Thomas Reddington deceased to the representatives of Alday and Kerrison in the bill mentioned," and if he should be of opinion that the plaintiff was entitled, then to take the usual accounts.

The Master made his report in May 1845, and thereby found the foregoing facts, and that the plaintiff as administrator of Sir Roger Kerrison was entitled to the legacy bequeathed by the will of Thomas Reddington, and that it was the first incumbrance on the real estate, the personalty proving insufficient. To this report exceptions were taken on behalf of Stephen Reddington Roche a minor defendant, who was entitled to a part of the lands charged. The cause now came on to be heard on report, exceptions and merits.

Argument. **Mr. Baldwin, Mr. Deasy and Mr. P. J. Blake,** for Stephen Reddington Roche.

They contended that, by the terms of the will of Thomas Reddington, the bequest went to the next-of-kin of Sir Roger Kerrison, who should all have been made parties to the suit, and should have been found entitled as well as the plaintiff.

Mr. Longfield, Mr. J. D. Fitzgerald and Mr. Thomas Galway, for the plaintiff.

They contended that the words "representatives" and "person entitled to the personal property" meant in their ordinary sense the executor or administrator, and that it should be so taken unless controlled by a different intention appearing on the will; that therefore the plaintiff was alone entitled; and that this was, at all events, only a question as to parties.

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Chancery.
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TON.
Argument.

The following authorities were cited: *Evans v. Charles* (a); *Wellman v. Bowring* (b); *Stevens v. Bagwell* (c); *Price v. Strange* (d); *Bridge v. Abbott* (e); *Palin v. Hills* (f); *Cotton v. Cotton* (g); *Holloway v. Clarkson* (h); *Loy v. Duckett* (i); *Attorney-General v. Malkin* (k); *Jenkins v. Briant* (l); *Long v. Blackhall* (m); *Holloway v. Holloway* (n); *Saberton v. Sheels* (o); *Williams on Executors*, pp. 902, 903.

THE LORD CHANCELLOR.

I do not entertain any doubt upon this case, although at first I thought I should have wished to look into the authorities cited before deciding it. The objection to the plaintiff's right to maintain the bill is, that this bequest is not a bequest which can be considered as intended for the legal personal representative of Sir R. Kerrison, but for the next-of-kin. Referring to the language of the will, I think the testator intended to do an act of justice to the firm and to give the legacy to the person who represented their estate. There is enough to mark the fund to which he intended that this bequest should go. Firms may continue for years after the original parties have ceased to be concerned in them, as very often occurs in England. The old partners retire and new ones

Judgment.

(a) 1 *Anst.* 128.

(b) 1 *Sim. & St.* 24; *S. C.* on further directions, 3 *Sim.* 328.

(c) 15 *Ves.* 139.

(d) 6 *Mad.* 159.

(e) 3 *Bro. C. C.* 224.

(f) 1 *My. & K.* 470.

(g) 2 *Beav.* 67.

(h) 2 *Hare*, 521.

(i) *Cr. & Ph.* 305.

(k) 2 *Phil.* 64; *S. C.* 1 *Coop. temp. Cot.* 237.

(l) 6 *Sim.* 603.

(m) 3 *Ves.* 486.

(n) 5 *Ves.* 399.

(o) 1 *Rus. & My.* 587.

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Chancery.
KERRISON
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TOK.
Judgment.

come, but still the business is conducted as that of the same firm and often in the same name, and it is the constant course to transfer the debts from the old to the new partners. If Sir R. Kerrison had continued to his death a member of the firm, and before he died had taken a partner, they would in mercantile understanding have represented the former firm. But he died sole representative of the firm.

I think the case is within the principle of Lord Brougham's judgment in *Palin v. Hills* (a). The doctrine there laid down is, that we must judge what was the real meaning of the testator and whether there is enough to show that he intended to leave it to others to control the devolution of the legacy. After mentioning an instance in which he supposes a testator to have left the legatee, in case of his pre-decease, the power of determining the person who should take after him, instead of himself designating him, he says:—
 "This is a supposition not to be easily made or readily adopted. There is no rule of law indeed against such a substitution ; but the tendency of all men is rather to select the object of their bounty themselves than to leave to others the task of doing so, or to take such as others may have chosen, when they themselves are in ignorance of the choice made. I do not mention the general tendency of the law, which is little prone to assume that money or other personal chattels have been made the subject of a substitutionary gift resembling an entail, because this would apply also to substituting the next-of-kin ; but I rest on the greater probability that a testator, unless he has expressly or by necessary implication said otherwise, meant to give his property to those he selected and knew of, rather than to those of whom he knew nothing." He then goes on to consider the construction of such a gift to the executors of a relation. That doctrine is true as to a personal legacy. If the bounty is intended for children, it is intended for those who would succeed to the testator's regard after their parent. But that does not apply here. Here the intent is that the debt and obligation of the testator's parent should be made good. That appears from the will. Suppose Mr. Alday had left his property to other persons

(a) 1 My. & K. 470.

and not to Kerrison, there would be two separate estates representing his property; the personal representatives of Alday would take one share and those of Kerrison the other share, not as personal bounty, but as representing the firm. The personal estate of Sir R. Kerrison represents the estate of the firm of Alday and Kerrison. It is therefore represented by his personal representative chosen by the Ecclesiastical Court. When he died it vested in the ordinary, who granted that administration, and the present plaintiff is under that grant entitled. The legal right is thus transferred to him, and I see no reason for holding otherwise than that he is, as between the parties to this cause, entitled to this money.

It may be another question whether the plaintiff is entitled to hold it as between him and the next-of-kin. If there are debts of the firm of Alday and Kerrison, I do not think that the next-of-kin could say they were entitled to the fund. That would be very unjust, and I doubt if such a construction could be sustained. That, however, is another question. There must now be the common decree.

Reg. Lib. 97, fol. 123, 1847.

1847.
Chancery.
KERRISON
v.
REDDING-
TON.
—
Judgment.

M'NAMARA v. BLAKE.

June 28, 29,
30.

XAVERIUS BLAKE being seised of estates in fee-simple, confessed a judgment for £80,000, which was subsequently assigned to John Bachelor. In the year 1773 Xaverius Blake settled his estates on his marriage on himself for life, remainder to his first and other sons

charge on a five hundred years' term, proved it, and it was reported. The cause was brought to a final hearing, and a decree made for a sale of the inheritance for payment of A and the other creditors. Supplemental suits were afterwards instituted by A's representatives, who were ultimately settled with, and no sale was had. B's representatives filed a bill praying the benefit of the former decree, and to have a sale of the term, making A's representative a notice party. *Held*, that as B was not entitled to such a decree as was made in A's suit, it could not be carried out for the plaintiff, or cut down so as to be limited to the term, at least in the absence of A's representatives, who might still have rights under it.

Under the decree to account in a suit instituted by A, a creditor on the inheritance, B having a puisne

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M'NAMARA
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Statement.

in tail, and created a term of five hundred years to secure £10,000, portions for younger children, to be raised by sale or mortgage of the term.

After the death of Xaverius Blake, Bachelor filed a bill to raise the amount of the judgment against Walter Blake, the eldest son of Xaverius Blake, and others, and after various proceedings a decree was pronounced in July 1816, to take an account of the sum due on foot of the judgment and of the incumbrances affecting the real and personal estate of Xaverius Blake. Under this decree Hugh Molloy was reported entitled to the sum of £2477. 3s. 5d. as the administrator of Henry Butler, assignee of the share of £10,000 belonging to Arthur Blake, one of the younger children. In 1818 there was a decree for a sale of the lands for payment of the sums due on foot of the judgment and the other sums reported due; and this decree was affirmed on a rehearing in 1819. These decrees not having been carried into execution, Bachelor filed a further bill, and a decree was made in 1826, to carry the former decrees into execution, which last decree was varied in 1827 merely as to the amount due to Bachelor. Bachelor died, and the suit was revived by his executors; but an arrangement was subsequently entered into between them and the Blake family, in consequence of which they did not proceed to a sale, and they were subsequently paid off and assigned the judgment and decrees to Felix M'Donnel.

In 1844 the plaintiff, after the death of Hugh Molloy, took out administration to Walter Butler, and filed his bill praying to have the full benefit of the suit of *Bachelor v. Blake* and of the decrees and accounts in that cause, and that these decrees might be carried into execution so far as might be necessary for the relief of the plaintiff, for an account and payment of what was due to him on foot of Arthur Blake's portion, and that in default of payment, "the said sum and all prior and contemporaneous incumbrances might be raised by a sale of a sufficient portion of the said lands comprised in the said term."

In March 1847 a supplemental bill was filed to bring before the Court Xaverius Blake the younger, who was entitled as first tenant in tail.

Felix M'Donnell the assignee of Bachelor's judgment and decrees was made only a notice party.

The cause now came on to be heard.

r. Serjeant *Warren* having stated the case for the plaintiff—

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Chancery.
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v.
BLAKE.
—
Argument.

The *Attorney-General* (Mr. Moore) and Mr. *F. W. Walsh*, for the defendant Xaverius Blake, contended that the plaintiff was not entitled to have the decrees in *Bachelor v. Blake* or any of them carried into execution, inasmuch as they were erroneous in directing a sale of the inheritance of the lands, not only for the payment of the judgment to Bachelor, but also for the sum reported due on the charge of £10,000, and which was secured only on the term of five hundred years. They also submitted that the assignee of the judgment was a necessary party, as being interested in the execution of the decrees, and that he was only a party by notice.

Mr. *O'Brien* and Mr. *Maley*, for the plaintiff, contended that the decrees in *Bachelor v. Blake* were not erroneous; but that even supposing they were erroneous so far as directing a sale of the inheritance to pay the charge, still the Court could, as this suit was framed, direct the decrees to be carried into execution for the plaintiff, by ordering a sale of a competent part of the lands for the residue of the term. They also submitted that it was not competent for either Walter Blake or Xaverius Blake, who claimed through him, to impeach the decrees, inasmuch as Walter Blake, after he attained his majority and had opened and re-settled the estates, had recognised these decrees and was bound by them.

The following cases were cited: *West v. Skip* (a); *O'Connell v. M'Namara* (b); *Stamer v. Nesbit* (c); *Jenkins v. Briant* (d); *Harrison v. Duignan* (e); *Bandon v. Becher* (f).

(a) 1 Ves. 239.

(c) 9 Ir. Eq. Rep. 96.

(e) 2 Dru. & War. 295.

(b) 3 Dr. & War. 411.

(d) 6 Sim. 603.

(f) 9 Bli. 532.

1847.
Chancery.
M'NAMARA
v.
BLAKE.
 June 29.
Judgment.

The LORD CHANCELLOR.

The decree is right in directing a sale of the inheritance for payment of Bachelor's demand which bound the inheritance; but it is wrong in directing payment of the demand of the present plaintiff out of the proceeds of the sale of the inheritance. Is it possible to cut that decree in two and leave Bachelor's representatives to act on it when they choose, giving the plaintiff here the relief proper for his case? I have great difficulty from Bachelor's assignee being only a notice party. The prayer of the supplemental bill is not for a sale of the fee to pay prior incumbrances and of the term to pay the plaintiff's demand; but it prays a sale of the term only, thus cutting down Bachelor's rights behind the back of the parties interested in maintaining them. The decree is also against the course of the Court; for it purports to deal with estates of Xaverius Blake when there were none; it should have been against the estates of which he was seised at or since the rendition of the judgment. If the plaintiff had by mistake taken a decree for a sale of the inheritance, when he was entitled to a sale of the term, and came and said that that was a mistake, the Court might amend it. But that is not this case. This is Bachelor's decree, and contains an error so far as relates to the plaintiff; and Bachelor is not asking for its execution so far as it is right, but his representative objects to it. I am anxious to give the plaintiff relief, but there is great difficulty.

The utmost the plaintiff can get is a decree to account, and that is only postponing the difficulty. In *Stamer v. Nesbit* (a) this question did not arise, for the parties there did not seek to carry out the decree or to reform it. I will consider the question.

June 30.

The LORD CHANCELLOR.

I have considered the difficulty in this case. I do not think I can do any thing without having the representative of Bachelor before the Court. I can only make such a decree as could have been made on an original bill, and I could not give the relief sought

(a) 9 Ir. Eq. Rep. 96.

by this bill. However, as the plaintiff seeks payment of a just demand, I will allow the case to stand over until next Term, and let the parties consider what they can make of it. If nothing is done by the first day of next Term, the bill must be dismissed. I must give the costs of this hearing to such of the defendants as ask for them; and let the cause stand over, with liberty to the plaintiff to bring before the Court the parties beneficially interested in former decrees, or otherwise proceed as he may be advised.

Reg. Lib. 97, fol. 300, 1847.

1847.
Chancery.
M'NAMARA
v.
BLAKE.
Judgment.

O'BRIEN v. SCOTT.

THIS was an appeal from the decision of the Master of the Rolls, reported *ante*, p. 63.

Nov. 6.
O'Brien v. Scott, ante, p. 63, on appeal.
Case to a Court of Law offered.

The *Solicitor-General* and Mr. *P. Blake*, in support of the appeal, relied on statute 7 & 8 *Vic.* c. 90, and contended that the appellant was protected by the 2nd section, being included in the word "creditors;" and even if not, that the statute 3 & 4 *Vic.* c. 105, having made judgments a charge made judgment creditors purchasers *pro tanto*. The same topics were pressed in argument as were urged at the Rolls.

Mr. *O'Callaghan*, contra.

THE LORD CHANCELLOR, in the course of the argument, observed that so far as the case depended on the construction of the statute 7 & 8 *Vic.* c. 90, it should be carried very far beyond what was indicated by the recitals in it, if the argument for the appellant was sustainable, which would extend it to a class not within the recited mischief or the benefit intended; and that if the word "creditors"

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Chancery.
 O'BRIEN
 v.
 SCOTT.

Nov. 22.
Judgment.

in the 2nd section did not refer to the recitals mentioning "heirs, executors and administrators," the Act would wholly omit to provide for one of the mischiefs recited in it.

The LORD CHANCELLOR said, that the case involved two questions purely legal; first, whether the statute applied at all to the case of a creditor having issued an elegit? and secondly, whether it affected the priority of two judgments *inter se*? and offered the appellant either to allow further time for proceeding at law or to direct a case to a Court of Law.*

* No further proceeding was taken in the case.

1847.
 Nov. 23.
 1848.
 April 28.
 May 9.

FISHER v. KING.

In administration suits, concerning personal estate, where there is no fund to pay the plaintiff, the general rule is, that the plaintiff does not get costs out of a fund belonging exclusively to creditors of a higher degree, unless they be salvage costs, or there are special circumstances.

And where the plaintiff, a simple contract creditor, knew that the judgment debts would exhaust the assets, as they did, and her object in the suit was to have a certain fund decreed to be equitable assets, in which she failed, no costs were given.

THE bill in this cause was filed by Ellen Fisher, a simple contract creditor of Viscount Kingsborough deceased, against his personal representatives, and prayed the usual accounts of his personal estate. A decree to account was made in 1837. The judgment debts proved under the decree were more than sufficient to exhaust all the assets, and there was also a large amount of specialty debts proved.* The plaintiff had endeavoured to establish that a sum which formed a considerable part of the personal estate was equitable and not legal assets, and that she was therefore entitled to be paid proportionably out of it; but the Master had decided against her on this point, and the report was unexcepted to.

The cause was now heard on report and merits.

The cause was now heard on report and merits.

The *Attorney-General* and Mr. *Campion* asked that her costs should be decreed to the plaintiff, and contended that the practice is to give the plaintiff in an administration suit his costs in the first instance though he is only a simple contract creditor and the funds will not extend to pay him: *Larkins v. Paxton* (a); *Barker v. Wardle* (b); *Bennet v. Going* (c).

1847.
Chancery.
FISHER
v.
KING.
Argument.

Mr. *Scully*, contra, contended that the practice now was to give the plaintiff his costs only along with his demand in all creditors' suits: *Drake v. Forde* (d); *Peyton v. M'Dermott* (e); *Taylor v. Gorman* (f); *Nelson v. Brady* (g).

Mr. Serjeant *Warren* and Mr. *James Greene*, for other parties.

THE LORD CHANCELLOR.

I think the plaintiff must have her costs only in the same priority as her demand, unless a case of salvage costs can be established. That seems settled by *Taylor v. Gorman* (h), and the other cases in this country which have followed it. I cannot discover that there are any part of these costs incurred in any special proceedings in the nature of salvage proceedings to realise funds; if there were, I would give the plaintiff the costs of them. The case may stand over to have this enquired into.

1848.
April 28.
Judgment.

Even in England the rule is not to give costs always in the first instance. *Ottley v. Gilby* (i) and *King v. Bryant* (k) show that costs in administration suits depend on the facts of each case. It is true, however, that our rule as to costs of creditors' suits, at least as against real estate, is different from the practice in England; and it is so well established, that it can be altered only by a general order of the Court or on appeal to some higher tribunal.

(a) 2 My. & K. 320.

(c) 1 Mol. 580.

(e) 1 Dru. & Wal. 234.

(g) 4 Ir. Eq. Rep. 359.

(i) 8 Beav. 602.

(b) 2 My. & K. 818.

(d) 3 Ir. Eq. Rep. 56.

(f) 1 Dru. & Wal. 235, n.

(h) 1 Dru. & Wal. 235, n.

(k) 4 Beav. 460.

1847.
Chancery.
FISHER
v.
KING.

May 9.
Argument.

The *Attorney-General* and Mr. *Campion*, for the plaintiff, argued that an administration suit is not subject to the same rule as a suit by an incumbrancer on real estate, and that in the former the plaintiff, unless he has been guilty of some default or misconduct, is entitled to his costs in the first instance; that the distinction between creditors' suits against real and personal estate runs through all the authorities; that real estate being a durable fund, while personal assets are liable to be easily lost, affords a reason why more favour should be shown to the plaintiff proceeding to make the latter available. They also submitted that, even if it was necessary to show any peculiar circumstances to entitle the plaintiff to costs, such did exist here, for the number of judgment creditors was such that the accounts were indispensable before the plaintiff could be paid; that for this purpose salvage costs do not mean the costs merely of such proceedings as were necessary to prevent some fund being lost, or which involved some peculiar exertion, but simply the costs of a suit in which a fund has been realised for creditors; and therefore when once it is shown that the suit was one which somebody should have instituted, and not wantonly begun, the plaintiff's costs are considered salvage costs. *Kelly v. Kelly* (a); *Executors of Maguire v. Dundass* (b); *Gray v. Crawford* (c); *Nelson v. Brady* (d).

Mr. *Scully*, contra.

Judgment.

THE LORD CHANCELLOR.

I allowed this case to stand over in order to give the parties an opportunity of seeing if they could point out any thing to show that it was a suit in which the plaintiff should have her costs, in the first instance, out of the funds which in fact belong to the specialty creditors and in which the plaintiff has no interest.

The rule is long since settled as to suits to raise charges on real estates, that the plaintiff gets his costs in the priority of his demand;

(a) 1 Ir. Eq. Rep. 319.

(b) 1 Ir. Eq. Rep. 25; S. C., Jo. & Car. 2.

(c) 1 Ir. Eq. Rep. 274; S. C., Jo. & Car. 174.

(d) 4 Ir. Eq. Rep. 359.

and as to administration suits it is by no means of course that the plaintiff in such a suit gets the costs of the cause; but if by the general character of the suit and the proceedings in it, or by any special proceedings, funds be realised which might otherwise have been lost, or outstanding assets are got in and made available for the benefit of all parties, the plaintiff would then stand in the character of a salvage creditor, and the case would be different. I have been anxious to see if the plaintiff in this suit could be considered as occupying that position; but on reading the report he does not appear to me to do so. The funds here will be exhausted by a class of creditors, the existence of whom the plaintiff could have discovered by a search in the records of the Courts of Law, namely, judgment creditors. The bill was filed, not for the purpose of getting in assets which might not otherwise be made available or which were in any danger, but for the purpose of ascertaining if the admitted fund was legal or equitable assets; if legal, there is no question that the plaintiff could not be paid her demand. That was the main question in the cause, and on which alone the plaintiff could have speculated on the right to get one shilling, and it has been decided against her. I would be glad to lay down a general rule, and not to have those questions of costs discussed over and over again. The Registrar states that there is no distinction between administration suits and incumbrancers' suits on real estate as to the point of costs. On the contrary, he says that the general rule is, that the costs go with the demand unless in salvage cases. That exception may, however, apply to the whole suit as well as to part only of the proceedings. Baron Richards, in the case cited, seems to say, that a case for costs, even in salvage cases, must be made in the bill; that seems to me to be going very far. I will let the matter stand over for a day or two more, and will in the meantime look into the proceedings.

1848.
Chancery.
FISHER
v.
KING.
Judgment.

His Lordship ultimately did not give the costs, the suit appearing to have been instituted merely to try the question as to the nature of the assets, and it appearing by the pleadings that before

1848.
Chancery.
FISHER
v.
KING.

Judgment.

the bill was filed, the plaintiff was apprised that there were judgment debts to an amount much greater than the assets.

Reg. Lib. 99, fol. 179, 1848.

O'DOWDA v. O'DOWDA.

1849.
Feb. 8, 18.

A creditor, plaintiff in an administration suit to carry out the trusts of a voluntary deed, including personal estate, is entitled to his costs in the first instance, having put the personal estate in a train to be realised.

THE bill was filed to carry into execution the trusts of a certain voluntary deed executed by James O'Dowda deceased, under which the plaintiff claimed, whereby he vested all his real and personal estate in trustees upon trusts for the payment of debts, and subject thereto for the benefit of the plaintiff and his children. The real estate was insufficient for the payment of the debts, and the personal estate consisted principally of bills of costs due to James O'Dowda, who had been a solicitor and attorney. No part of the fund had as yet been realised.

Mr. J. D. Fitzgerald, and Mr. F. Smith, for the plaintiffs.

Argument.

They contended that the plaintiffs were entitled to their costs in the first instance, and cited *Thornley v. Dundass* (a); *Burkitt v. Ransom* (b); *Statton v. Doggett* (c); *Tanner v. Dancey* (d).

Mr. B. C. Lloyd, for some of the defendants, contended that the plaintiffs were entitled to their costs only in the priority of their demand, as they came before the Court in the character of creditors only, the instrument under which they claimed being a deed and not a will, and no funds had yet been realised. He insisted that the cases cited by the plaintiff's Counsel were principally English authorities, which do not apply to this country, the practice there

(a) Jo. & Ca. 2.

(c) 3 Beav. 9.

(b) 2 Col. C. C. 536.

(d) 9 Beav. 339.

being to give the plaintiff in every creditor's suit his costs in the first instance, whereas the settled practice of this country, as stated by Sir Edward Sugden in *Nelson v. Brady* (a), is to give the plaintiff his costs only in the same priority as his demand, unless in excepted cases, of which this was not one.

1849.
Chancery.
O'DOWDA
v.
O'DOWDA.
Argument.

Mr. *Maley*, Mr. *Meagher* and Mr. *Isidore Blake*, for other parties.

The LORD CHANCELLOR said that he had occasion lately to consider this question fully in another case which had come before the Court; and it appeared to him that the result of all the authorities was that, in a case such as the present, though not strictly an administration suit, the plaintiff was entitled to his costs in the first instance, where he puts a personal estate into a train of administration, and where there was no doubt that the plaintiff's exertions would enable the personal estate to be ultimately realised. He stated, however, that he would look into the authorities again before making his order.

Judgment.

His Lordship subsequently ordered that the plaintiff should be paid his costs out of the personal estate in the first instance.

Reg. Lib. 101, *fols.* 87, 116, 1849.

(a) 2 Dr. & War. 143.

1848.

Chancery.

In re M'CULLAGH, a Bankrupt.

April 18.

The 7th General Order in Bankruptcy applies to equitable mortgages.

Statement.

MR. J. D. FITZGERALD moved a petition on behalf of an equitable mortgagee, for an order to take an account of the sum due to him and to have a sale of the part of the bankrupt's estate equitably mortgaged to him, and for liberty, under special circumstances, to bid at the sale. He cited *Ex parte Tate* (a); *Ex parte Payler* (b); *Ex parte Jennings*, in re *Dawson* (c).

Argument.

Mr. *Creighton*, contra, contended that the application was irregular, as the mortgagee should have proceeded under the 7th Order in Bankruptcy, which includes equitable mortgages, though the old Rule did not; that such was now the usual practice in bankruptcy, and for many years such petitions as this have not been considered necessary; and as the liberty to bid would be a favour to the petitioner he asked for costs of the application.

Mr. *Fitzgerald*, in reply, argued that the Order here was not more extensive than that made by Lord Loughborough in England, to which the authorities cited applied; and to the present day a petition was there necessary: *Archbold on Bankruptcy*, p. 220.

Judgment.

THE LORD CHANCELLOR said he thought the words of the 7th General Order were sufficient to include the case of an equitable mortgagee and to authorise the practice stated by Mr. *Creighton*, although the authorities were against the application of the old Rule to cases of equitable mortgages (d); that he would ascertain what the practice was and make the order accordingly; but if the petitioner was obliged to come to the Court for the order for a sale, he would not make him pay the costs of the application.

(a) 5 Law Rec. N. S. 299.

(b) 16 Ves. 434.

(c) 2 Swanst. 360.

(d) See 16 Ves. 434; 2 Swanst. 360.

His Lordship considered the petition unnecessary as regarded the sale, but the prayer of it not being objected to, he made an order directing an account of the sum due to the petitioner and a sale ; and that the funds should be applied in payment of the costs of the sale and then in discharge of the petitioner's demand, and the balance to the assignee ; with liberty to the petitioner, if the proceeds should be insufficient to pay him, to prove for the balance of his demand ; and that he should be at liberty, by himself or a trustee, to bid at the sale ; and that the petitioner should pay to the assignee his costs of appearing on the petition.

1848.
Chancery.
In re
M'CULLAGH,
a Bankrupt.
Judgment.

BEDDY v. SMITH.

THIS was an ordinary administration suit for an account of the estate and effects of Samuel Smith, deceased, who died intestate. The bill was filed by one of the next-of-kin, and the rest of the next-of-kin were made answering parties. The usual accounts were taken under the decree, and the cause now came on to be heard on the Master's report. The only question argued was raised on the part of the executor of the widow of the intestate, who was entitled to a moiety of the personal estate, and insisted that the plaintiff should pay all the costs of the next-of-kin, occasioned by their having been made answering parties. The question was raised by the answer and also by a notice calling on the plaintiffs to amend the bill. The point, though not pressed at the first hearing, was mentioned, but postponed to the final hearing.

May 2.
In an administration suit by one of the next-of-kin of an intestate, the other next-of-kin are within the 15th General Order, and the plaintiff must pay their costs if they are required to answer ; and the objection need not be made at the first hearing.

Mr. *Christian* and Mr. *James Plunket* insisted that the next-of-kin came within the terms of the 15th General Order, no relief, account or conveyance being sought as against them, and that, not having been made notice parties, the plaintiff should pay all costs

Argument.

1848.
Chancery.
BEDDY
v.
SMITH.

consequent on their answering, under the 21st General Order:
Daniel on New Orders, pp. 50, 51; *Davis v. Davis* (a); *Knight v. Cawthorne* (b).

Argument.

Mr. *J. D. Fitzgerald* and Mr. *Butt*, for the plaintiffs, contended that direct relief was necessarily sought against all parties entitled to shares of the personal estate out of which payment was sought by the plaintiff, though no account or payment was prayed against them: *Urquhart v. Urquhart* (c); *Hawkins v. Hawkins* (d); *Webb v. Blessington* (e); and that the point should have been insisted on at the first hearing. It was also argued that as some of the assets had come to the hands of two of the next-of-kin, they at all events were properly made answering parties.

Mr. *Wall* and Mr. *Richard Armstrong*, for other parties.

THE LORD CHANCELLOR.

Judgment.

I have no doubt upon this point. I am very clearly of opinion that the 15th General Order includes the present case. I believe that it was this very class of cases that produced the making of the rule; for the very worst instances of accumulation of costs arose in relation to next-of-kin, who often are so numerous. If the rule did not apply to such a suit as this, I should take care to call upon the Master of the Rolls to assist me in making one to apply to it. But I have no doubt of its application. No account, no relief is prayed or conveyance sought here against these parties. The next-of-kin are admitted to have the same rights as the plaintiff; and if that is seeking direct relief, there is no case to which the rule would apply. Such a construction would annul the rule altogether.

With regard to this objection not having been made at the former hearing, that does not apply; for the rule allows the plaintiff to go on if he pleases, and he may, if he thinks proper, keep those parties

(a) 4 Hare, 389.

(b) 17 Law Jour. 103; S. C. 13 Jur. 33.

(c) 13 Sim. 613.

(d) 1 Hare, 543.

(e) 1 Mol. 74.

before the Court, which has no power to control or prevent him. Independent of the authorities which have been cited, I think the rule is quite clear; but with these authorities I am perfectly satisfied. They are necessary parties, but parties within the meaning of the 15th General Order, and the costs of keeping them before the Court must be paid by the plaintiff.

It is said, however, that there are special circumstances which distinguish the cases of two of the next-of-kin, as they got part of the assets into their hands; but how have they got these assets into their hands? They got them in consequence of a notice from the plaintiff himself. I cannot give the plaintiff the costs for having done the very act which, according to his own statement, made these persons necessary parties; and the plaintiff cannot throw these costs on the funds. There is therefore no distinction between the cases of the several defendants; they all stand in the same predicament and the rule applies to them all. If the plaintiff's title had been disputed, or if there were grounds for disputing it, then there would be a fair reason to say that all the parties so disputing the title should be kept before the Court to state their objections; but no such ground exists in this case.

Reg. Lib. 99, fol. 59, 1848.

1848.
Chancery.
BEDDY
v.
SMITH.
Judgment.

HOOPS v. LORD KINGSTON.

THIS case came on to be heard on report, exceptions and merits. It appeared that by a report in the matter of the late Lord Kingston a lunatic the Master found that the sum of £1500 was due to Lord Mountcashel, having been paid by him to the receiver and applied by the latter for the benefit of the lunatic; and by the order confirming the report, made in November 1837, it was ordered that the receiver should be at liberty to pay this sum, amongst others.

May 7.
Orders in lunacy giving the receiver liberty to pay money are not within the meaning of the 27th section of 3 & 4 Vic. c. 105, so as to bear interest.

1848.
Chancery.
 HOOPS
v.
 LORD
 KINGSTON.

Lord Mountcashel filed a charge in this cause on foot of this demand, and claimed the principal sum and £510. 10s. interest at the rate of £4 per cent. from September 1837 to March 1846. The Master disallowed the claim for interest, and found that the principal sum alone was due. To this report Lord Mountcashel excepted, insisting that the Master should have allowed him interest at £4 per cent.

Argument. Mr. Deasy and Mr. James S. Greene, for the exception, contended that this order came within the 27th section of the 3 & 4 Vic. c. 105, by which it is enacted that "All orders of the Lord Chancellor in matters of lunacy, whereby any sum of money or any costs, charges, or expenses shall be made payable to any person, shall have the effect of judgments in the Superior Courts of Common Law, and the persons to whom any such moneys or costs, charges or expenses shall be payable shall be deemed judgment creditors within the meaning of this Act;" and that being the same as a judgment it bore interest at £4 per cent. under the 26th section.

Mr. Serjeant Warren, for the defendant, contended that this order did not impose a liability on any person; that it was merely a direction or permission given by the Court to its officer in matters of which the Court has peculiarly the management; that the 27th section of the statute had reference only to cases where there was a personal obligation by the order; and that interest is given for personal default, but if there is no person to pay, there is no default: *Lynch v. Skerrett (a)*.

May 10.
Judgment.

The LORD CHANCELLOR.

I have no difficulty whatever in overruling this objection. It would lead to great difficulties, and would be a conclusion to which I would not come unless absolutely coerced by the language of the Legislature, if I were to hold that in administering the affairs of lunatics I must be placed in this situation, that upon the termination of the lunacy matter the estate would be liable to pay interest

(a) 5 Ir. Eq. Rep. 494.

on the amount of all sums of money in relation to the payment of which orders had from time to time happened to have been made. I must give a reasonable construction to this section of the statute.* The Court looks upon these orders in lunacy matters as made merely for the purpose of administering the estate and directing the manner in which the rents are to be disposed of. The order in this case was made for the benefit of the lunatic, and not at all for the party to whom the money was to be paid; it was an *ex parte* order, made entirely for the guidance of the receiver, and amounted to no more than a declaration by the Court that he was to be at liberty to make this payment. I have therefore no difficulty in overruling the exception.

1848.
Chancery.
HOOPS
v.
LORD
KINGSTON.
Judgment.

Mr. *Brewster*, Mr. *Gayer* and Mr. *Bland* made separate applications on behalf of several persons who were reported entitled to separate parts of the portions of younger children, which were charged on the Kingston estates, for the separate costs of their respective clients. The parties had each put in separate answers.

The separate appointees of portions of an entire charge (and not those claiming partial or sub-interests in portions of it) are entitled to separate costs as defendants in a suit relating to the estate charged.

Mr. Serjeant *Warren*, on behalf of Lord Kingston, resisted granting more than one set of costs upon the whole charge, and cited *Stewart v. Lord Donegal* (a), *Farr v. Sheriffe* (b), *Gaunt v. Taylor* (c) and *Hamilton v. Patten* (d).

The LORD CHANCELLOR held that, so far as the parties were separate appointees of portions of the original charge, they were to be considered as having separate charges, and were each entitled to his separate costs; but so far as any of them claimed only sub-interests, as assignees of portions of any of the sums so separately appointed, they were entitled only to one set of costs amongst them.

Reg. Lib. 99, fol. 132, 1848.

(a) 8 Ir. Eq. Rep. 621.

(b) 4 Hare, 528.

(c) 2 Beav. 346.

(d) 1 Ir. Eq. Rep. 341.

* 3 & 4 W. 4, c. 105, s. 27.

1848.

Chancery.

HANCOCK v. HANCOCK.

May 17.

The decision of the Common Pleas in *Handcock v. Handcock* (10 Ir. Law Rep.) on the effect of a release of part of the debtor's lands from a judgment in discharging his other lands, doubted.

Statement.

WILLIAM HENRY HANCOCK, in 1824, was seised in tail male of the lands of Carintrilly and indebted by judgment to several persons; and in September of that year he settled this estate on himself for life, with remainder to the issue of his marriage. In 1825, he purchased the lands of Cartron in fee. In 1829, being about to borrow a sum of money on mortgage from William Elias Handcock, he procured the judgment creditors, in order to release the lands of Cartron, to execute a deed poll dated 8th of April 1829, whereby, after reciting that W. Henry Handcock was desirous of having these lands clear of all incumbrances and had requested them to release the same from their incumbrances thereupon by their respective judgments to which they had agreed, they released, exonerated and discharged the lands of Cartron of and from their respective judgments and from all writs of execution and other writs, &c., and thereby agreed to indemnify and save harmless William Henry Handcock from all costs, &c., to be occasioned by reason of the lands being attached in execution or otherwise howsoever.

On the 1st of May 1829, William Henry Handcock mortgaged the lands of Cartron in fee-simple, and the lands of Carintrilly for his life.

W. Elias Handcock, in 1844, after the death of W. Henry Handcock, filed the present bill to foreclose the mortgage, against the daughters of W. Henry Handcock, who were tenants in tail in common; and upon the Master's report the question was raised as to the effect of the deed of release upon the lands of Carintrilly, the defendants Handcocks contending that it operated as a discharge of all the lands from the judgments. The case having come on to be heard on the report and exceptions before the Lords Commissioners in January 1848, they directed a case to the Court of

Common Pleas upon the following points:—"First, whether the said deed poll of the 8th of April 1829 had any and what legal effect or operation on the rights or remedies of the several parties entitled respectively to the said several judgments of Trinity Term 1824, and who executed the deed poll, or any of them, or the persons deriving under them respectively, or any of them, as against the lands of Cartron acquired by the said William Henry Handcock by purchase on the 6th of May 1825, being the lands mentioned in the said deed poll, and also mentioned and comprised in the said indenture of mortgage of the 1st of May 1829?" Secondly, "Whether the said deed poll of the 8th of April 1829 had any and what legal effect or operation on the rights or remedies of the said several parties who executed the said deed poll, or any of them, or the persons deriving under them respectively, or any of them, as against the said lands of Carintrilly comprised in the said indenture of marriage settlement of the 2nd of September 1824?"

The points were fully argued in the Court of Common Pleas in Easter Term 1848, and the Judges returned the following certificate:—

First—"We are of opinion that the legal operation and effect of the deed poll of the 8th of April 1829 was to exonerate the lands acquired by the said William Henry Handcock by purchase on the 6th day of May 1825, from the rights and remedies of the several parties entitled respectively to the several judgments of Trinity Term 1824 who executed the deed poll and of all parties deriving under them. Secondly—We are of opinion that the legal effect and operation of the said deed poll of the 8th of April 1829 was to exonerate the lands comprised in the indenture of marriage settlement of the 2nd of September 1824 from the rights and remedies of the said several parties who executed the said deed poll and who were entitled to the said judgments and of all parties deriving under them."

Mr. Christian, Mr. Isidore Blake and Mr. Edward Pennefather, *Argument.*
for the judgment creditors.

1848.
Chancery.
HANDCOCK
v.
HANDCOCK.
Statement.

1848. Mr. Martley, Mr. F. A. Fitzgerald and Mr. Owen, for the
Chancery. co-heiresses of W. H. Hancock.
HANCOCK
v.
HANCOCK. Mr. Fitzgibbon, Mr. Orpen and Mr. William Smith, for other
Argument. parties.

The same arguments were used and authorities cited as at the hearing in the Common Pleas, and will be found fully stated in the report of the case there (a).

May 17.
Judgment.

THE LORD CHANCELLOR.

As a matter of form I will affirm the certificate of the Court of Common Pleas. If the parties wish to re-open the first point, they may petition for a re-hearing. However, I must say that, though I have no difficulty as to the first part of the certificate, I should have very great difficulty in acting on the second part of it; and before I would do so, I should probably take the opinion of another Court of Law upon it. As this case must now go back to the Master's office, I will not say more at present than that I am not prepared to follow the certificate on the second point, at least without further consideration. It is a question of very great importance.*

Reg. Lib. 99, fol. 141, 1848.

(a) 10 Ir. Law Rep. 569.

* See the 72nd section of 11 & 12 Vic. c. 48 (passed the 14th of August 1848), by which it is provided that releases of a portion of lands from a judgment shall not affect the validity of the judgment, as a charge on the residue of the lands.

1848.
Chancery.

BRABAZON v. TEYNHAM.

May 18.

IN proceeding under the decree to account in this cause, a charge was filed against Lady Teynham, a defendant and creditor in the cause, seeking to make her responsible for various sums applicable to the payment of her demand. In support of the claim she was examined on personal interrogatories, in her answer to which she admitted certain receipts, but also claimed various credits. The Master allowed the answers to be read for the purpose of establishing receipts against her, without reading the portions of it which established credits in her favour. An exception was taken to the report on this ground.

A party examining on personal interrogatories in the Master's office, may use as much of the answers as he chooses, without making the rest of them evidence.

Statement.

Mr. *Longfield* and Mr. *Bland*, in support of the exception, contended that by reading any part of the answers the whole of them were made evidence; that they were like an account in this respect: *Boardman v. Jackson* (a): that the rule should be the same as at law, or which applied to the answer to a bill of discovery in equity: *Ormond v. Hutchinson* (b): and that the answers might have been read for Lady Teynham, though not used against her: *Gilbert v. Wetherell* (c); *Perkins v. Minchin* (d).

Argument.

Mr. Serjeant *Warren* and Mr. *Maley*, contra, contended that the answers to interrogatories are just like an answer in a suit, or to a cross bill, and that the practice of the offices was so to treat them.

The LORD CHANCELLOR.

An answer to personal interrogatories is like an answer to a cross bill. The plaintiff in a cross cause may use just as much of the

Judgment.

(a) 2 B. & Bea. 382.

(b) 13 Ves. 47; S. C. 16 Ves. 94.

(c) 2 Sim. & Stu. 259.

(d) 2 Moll. 24.

1848.
Chancery.
 BRABAZON
 v.
 TEYNHAM.

answer to the bill as he chooses. The Master in this case also acted on the practice of his office in allowing the reading of the selected parts of the answers. That practice is consonant to reason and analogy.

Judgment.

As the Master acted, in my opinion, on a correct rule, the question becomes one of the weight of evidence merely; and I do not differ from the Master in the conclusion he has drawn.

Overrule the exception.

Reg. Lib. 99, fol. 155, 1848.

MONTGOMERY v. JOHNSON.

May 30, 31.

A testator named A, a trustee of part of her personal estate, and appointed him, her son and X's husband, executors.

The son and X's husband alone proved the will, but A did not disclaim. The son and X took life interests in the trust fund, to a part of which the plaintiff became, by X's appointment, entitled. A had been the testator's agent, and acted in the management

of the assets under powers of attorney from the executors who proved, ~~and X~~ and after the son's death from the surviving executor and X, which authorised him to receive the assets for the uses and purposes of the will. On A's death the defendant, his son and executor, acted under a similar power, and continued to do so after the death of X's husband. X and her husband got possession of the entire assets.—*Held*, that A and the defendant were responsible as trustees, and could not protect themselves as being agents only.

ELIZABETH FITZHENRY, being possessed of considerable personal property, by a will dated in 1790 bequeathed to Benjamin Johnson £2550 on the trusts therein declared, viz., on trust that he should, with the consent of her daughter Mary Sparrow, otherwise Fitzhenry (wife of Bartholomew Sparrow), place out or lend that sum on public or private securities, with power to change them with the like consent; and on trust to pay the interest or dividends to Mary Sparrow for her sole and separate use for her life, and after her death on trust to pay £500, part of the £2550, to such person and in such manner as she should appoint; and as to the residue of the sum, amounting to £2050, on trust in case Mary Sparrow should die leaving children, to pay it among them as Mrs. Sparrow should appoint, subject to certain restrictions. She also bequeathed £2600 to B. Johnson on certain trusts for the benefit of her son, with a remainder to Mrs. Sparrow; and named B. Johnson as her sole

executor. By a codicil, dated shortly after the will, the testatrix named her son J. M. Fitzhenry and Bartholomew Sparrow co-executors with Johnson.

The testatrix died in November 1790, and Fitzhenry and Sparrow proved the will, saving the right of Johnson.

J. M. Fitzhenry died in 1791, having made a will bequeathing all his property to Mrs. Sparrow.

Benjamin Johnson had been the agent of the testatrix for a few years before her death, and after her death he received various sums for interest on securities and also several securities and portions of principal sums, part of her personal estate, in the management of which he acted. Some of them were handed to or applied by the direction of Sparrow and wife. He never executed any formal disclaimer of the trusts of the will; but in December 1790, being very soon after the death of the testatrix, he took a power of attorney in the following form:—

“Know all men, that we J. M. Fitzhenry, Bartholomew Sparrow and Mary Sparrow his wife, which said J. M. Fitzhenry and Bartholomew Sparrow are the only acting executors of Elizabeth Fitzhenry, late of &c., and the said J. M. Fitzhenry and Mary Sparrow are the only children and devisees of said Elizabeth Fitzhenry, have made, constituted, &c., Benjamin Johnson, of &c., our true and lawful attorney for us, and in our and each of our names, places and stead, and to and for the uses and purposes mentioned in the last will and testament of the said Elizabeth Fitzhenry to ask, demand, collect and receive all the interest and produce, sum and sums of money whatsoever now due and owing, and which hereafter shall become due and payable, on or by virtue of all or any bonds, judgments, mortgages or other securities, passed or executed to said Elizabeth Fitzhenry, or on or by virtue of any Government securities of which said Elizabeth Fitzhenry died possessed,” and to give receipts, &c. The power concluded with a clause authorising Johnson to retain one shilling in the pound for his trouble, and was executed by J. M. Fitzhenry and Mr. and Mrs. Sparrow.

After the death of J. M. Fitzhenry, another power in the same form, except that it authorised the collection, “for the uses and

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purposes mentioned in the last wills and testaments of Elizabeth Fitzhenry and J. M. Fitzhenry," &c., was executed by Mr. and Mrs. Sparrow to Benjamin Johnson.

Accounts were settled between B. Johnson and Mr. and Mrs. Sparrow, in which he charged and was allowed agent's fees.

In 1806 Benjamin Johnson died, having appointed his son Benjamin Bower Johnson his executor. Very soon after his father's death, a power of attorney precisely similar to that made to his father was executed to him by Mr. and Mrs. Sparrow, and he continued to act in the management of Mrs. Fitzhenry's property as his father had done. It was alleged that he did so at the request of Mr. and Mrs. Sparrow, and merely as their agent. He allowed various sums of money to be received by them, conceiving, as he stated, that he had no authority to prevent it. For some years these sums did not exceed what they would have been entitled to under the wills of Mrs. Fitzhenry and J. M. Fitzhenry. He also paid Mrs. Sparrow interest on the £2550. He furnished accounts to her and her husband regularly.

Bartholomew Sparrow died in 1815. He left surviving him his widow and four children, of whom the plaintiff Mrs. Montgomery was one. Joseph, one of his sons, became his executor. He afterwards became largely indebted to Mrs. Fitzhenry's estate, on foot of sums advanced to him out of it by his mother's directions; and at the institution of the present suit was in embarrassed circumstances.

After her husband's death, the funds constituting Mrs. Fitzhenry's assets were suffered to be entirely under the control of Mrs. Sparrow. The defendant Johnson advanced large portions of them to her children and herself, and settled accounts with her. At her death the assets were almost entirely expended. The defendant Johnson had continued to act in the occasional management of them until 1827, up to which time Joseph, Bartholomew Sparrow's executor, did not at all interfere.

Mrs. Sparrow made her will in 1832. By it, after noticing that her mother had bequeathed certain sums to Benjamin Johnson in trust for her, with a power of appointment among her children, and that the greater part of her mother's personal estate had been already

at various times paid by her to her other children, but the plaintiff Mrs. Montgomery had not got an adequate share of it, directed that Mrs. Montgomery should have whatever remained of it, and whatever Mrs. Sparrow had of her own.

Mrs. Sparrow died in 1836. Mrs. Montgomery had been resident in England. She filed the bill in this cause in 1846, against Benjamin Bowen Johnson, claiming as appointee under her mother's will, and seeking a general account against Johnson of the personal estate of Mrs. Fitzhenry, and to make him responsible for any sums lost by default or mismanagement, and seeking to fix him with the liabilities of a trustee under Mrs. Fitzhenry's will.

The case made in the answer was, that Benjamin Johnson had declined to act as trustee under Mrs. Fitzhenry's will, but having been agent for her had consented to act as the agent of the executors who proved her will, and that therefore he, and the defendant as his representative, was responsible, not as trustee, but only as agent to his principals; that the same defence was, on still stronger grounds, open to the defendant for what had occurred since his father's death; and that therefore the plaintiff's remedy, if any, should be only against the representatives of the executors who proved, or of Mrs. Sparrow.

There was a part of the bill relating to a family settlement, but no question ultimately was decided upon it.

The *Attorney-General*, Mr. *Greene* and Mr. *Lyons*, for the plaintiff.

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They contended that the defendants B. B. Johnson and his father did not confine themselves to the duties of agents, but became trustees; that whatever may have been his intention, under the circumstances, B. Johnson must be taken to have acted as trustee and executor, and accepted that office under the will, and could not rely on the character of agent: *Conyngham v. Conyngham* (a); *Sharland v. Mildon* (b); *Harrisson v. Graham* (c);

(a) 1 Ves. sen. 552.

(b) 5 Hare, 469.

(c) 1 P. Wms. 241, n.

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Newman v. Williams (a); that the defendant was also liable as trustee: *In re Uniacke* (b); *Sheridan v. Joyce* (c); *Myler v. Fitzpatrick* (d): and that even if the defendant was ever merely an agent for the parties entitled, his protection ceased in 1818 on the death of Benjamin Sparrow, and he was responsible for suffering the *cestui que trust*, the tenant for life, to get the principal part of the funds.

Mr. Serjeant *Warren*, Mr. *Christian* and Mr. *Wall*, for the defendant B. B. Johnson.

They contended that B. Johnson, the defendant's father, acted as agent and not trustee, which was the converse of the case of *Harrison v. Graham*, in which the party described herself as executor, while the trustee here repudiated that character: *Doe v. Everard* (e); *Stacey v. Elph* (f); *Lowry v. Fulton* (g): that if the Court should hold that B. Johnson was chargeable only as agent, it would follow that the defendant, who was only his father's executor and not a trustee, could only be held an agent under a similar power to him; and that there was no default or breach of trust by the defendant's father up to his death. *Wilmott v. Jenkins* (h).

Judgment.

THE LORD CHANCELLOR.

The plaintiff is, I think, entitled to a decree. The case is a very peculiar one; there is no case to be found in the books like it. It may be collected from all the authorities that an executor may act as an attorney under a power from co-executors without incurring liability as an executor; but previous to so acting, he must do something equivalent to a disclaimer. What then are the facts of the present case? The will was framed with the greatest possible precision. It was open to Benjamin Johnson to have disclaimed; but he did not formally disclaim, nor did he renounce. The will creates a trust for Mrs. Fitzhenry and her children. By a codicil

(a) 10 Law Jour. N. S. Ch. 106.

(b) 1 Jo. & Lat. 1.

(c) 1 Jo. & Lat. 401; S. C. 7 Ir. Eq. Rep. 115.

(d) 6 Mad. 360.

(e) 1 Russ. & My. 231.

(f) 1 My. & Kee. 195.

(g) 9 Sim. 115.

(h) 1 Beav. 405.

two other persons are named in addition as executors; but no change is made in the trusts, which still continue, as originally, vested in Johnson. On the death of the lady Mr. Johnson does not appear to have done any act amounting to a disclaimer or renunciation; he does not show, as he plainly might, that his intention was to separate himself from responsibility. His object seems to have been to gain the management of the property and have also the advantage which as executor or trustee he could not have, viz., a percentage upon the receipts. That is open to suspicion. Whenever a person placed in a fiduciary situation not merely desires to take the office, but bargains for a profit not contemplated by the person who reposed the trust in him, that alone excites suspicion. I do not say that in this case any evil has arisen; for on looking to the accounts I find £5 per cent. charged only on what Mrs. Fitzhenry received in right of her life estate, which she plainly had power to give him if she chose.

But further, the power of attorney is given not merely from the executors, which would have been the correct course if Mr. Johnson was to be merely agent to them, but Mrs. Sparrow also joined in it. She is a *cestui que trust* to a large amount of the property, and not merely an executor or trustee; and not only does this *cestui que trust* join, but the power of attorney expressly directs the property to be collected for the uses and trusts expressed in the will. It is not an ordinary power of attorney, but such a document as a trustee might get written as a confirmation of his power as trustee. Under that power of attorney it is quite plain that if Mr. Johnson was called on to account, he would have been justified in discharging himself by saying he had applied the funds in payment of legacies and in execution of the other trusts of the will; and such a statement proved would have been a good discharge to him. If he could have the benefit of that he must be bound by the other consequences of his position; and he did act in accordance with that view, for he paid a legacy and charges that in his account, and also paid Mrs. Sparrow her interest, and also certain principal money which she was entitled to as a legatee. So far these charges are quite right,

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and the payments are referrible either to his original position as simple trustee or his character of delegated trustee.

I am not going so far as the case cited from *Equity Cases Abridged* (a), where a man's acting under a power of attorney from a trustee was considered to make him a trustee. This is a much stronger case, for the words of the power there were simply to manage the property. That case has not been questioned: but it is unnecessary to go so far here; for there is here a complete assumption of the trusteeship. Mr. Johnson paid the legacies, as I have mentioned; and if he had lived, would probably have applied the remainder of the funds according to the trusts also.

Benjamin Bowen Johnson is the executor of his father, and as such represents his character of trustee and is liable to account for any property which came to his father's hands. For aught I know, he may have possession of all the securities for the property. He became the person competent to take up these trusts. He might say to the *cestui que trusts*, "I am your trustee," and insist on his rights as such; and *e converso* they may insist on the liabilities flowing from the same character. He might also have repudiated the office and refused to act further; but instead of doing so he accepts the trusts again. The words remain "to and for the uses and purposes mentioned in the will." I must give a meaning to these words. Suppose the other *cestui que trusts* had called on Mrs. Sparrow and asked her what she had done, she would have referred to this power of attorney. What more could the parties have done to show that they were doing what was right to administer the trusts? Unless Mr. Johnson was an improper person to be employed, which is not pretended, it was a very proper course that he should continue to act as his father had done. In that view I cannot say he was to be regarded merely as an attorney. He never kept accounts with the parties as their agent any more than his father had.

Since Mr. Sparrow's death the matter is still clearer than for the period previous to it. He accounted with Mrs. Sparrow, who had no

(a) *Pollard v. Downes*, 1 Eq. Cas. Abr. pl. 4, p. 6; S. C. 2 Ch. Cas. 121.

right except as tenant for life. Her son never interfered as long as Mr. Johnson was acting, and no account was ever settled with him. He interfered afterwards, but until then he never got an account. Mrs. Sparrow had no right after her own £500 was paid to the principal. This case comes within the authority of *Sharland v. Mildon* (a), where the widow of the testator employed Hewish to collect some debts due to the estate which he afterwards paid over to her, knowing them to be part of the assets; she never obtained administration, and another person having afterwards become the legal representative, it was held that Hewish was responsible, never having accounted to the legal representative, who alone could give him a discharge. So here Mrs. Sparrow never had authority to discharge Johnson. She was not executor of Mrs. Fitzhenry. The rightful executor is now before the Court and may act.

The case of *Conyngham v. Conyngham* (b), before Lord Hardwicke, is an authority in favour of charging the defendant in this case. It was put on this ground, that the party there received the funds with clear notice of the trusts. That is so here. The power itself shows express notice quite clearly.

In *Lowry v. Fulton* (c) the question was not whether the executor who had not proved and was sought to be charged could be made accountable for the sums received, but whether having acted for a particular sum he was to be made liable for another sum. That case only shows that a person who receives some part of the assets as agent, without being executor, is not liable for the acts of another who receives other parts without his authority. The case before me now is within the meaning of Lord Hardwicke's words in *Conyngham v. Conyngham* (d). (What Mr. Johnson has done is at least an "ambiguous" act. I think it is an acceptance of the trusts, but he is liable also as representative of his father; and whether these moneys came into his hands by devolution from his father or by means of his own authority under the power of attorney, he is responsible as trustee.)

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(a) 5 Hare, 469.

(c) 9 Sim. 115.

(b) 1 Ves. 522.

(d) 1 Ves. 522.

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With respect to the part of the prayer relating to the settlement, and which is said not to be proved, it is referred to in the will, and at all events the defendant may have received assets applicable to that £500. That may be raised in the office. I will say nothing as to it now.

Reg. Lib. 99, fol. 166, 1848.

LUPTON v. STEPHENSON.

June 10.

The appointment of a person as receiver over a kind of property the management of which he does not understand, with an undertaking to act under the direction of a person who does understand it, is improper.

The appointment of a receiver who acts under the directions of a defendant is objectionable.

A reference to appoint a receiver sent back to the Master, though the Master's selection had been affirmed by the Master of the Rolls.

THIS was a mortgagee's suit for a sale, in which an order had been made for the appointment of a receiver. The principal part of the property in point of value consisted of a mill and machinery, which had cost £60,000. It was unlet, and the rental for the rest of the property was about £1000 a-year. The Master appointed as receiver Mr. B., the plaintiff's nominee; he was a solicitor, and did not understand the care of machinery, but gave a written undertaking to attend to the directions of a Mr. Stephenson who did. The defendants, the mortgagors, had proposed Mr. M'Cance, who was a notice party as a trustee for some members of the family having charges on the land, and who understood the care of machinery. The defendants appealed against the Master's appointment; and the Master of the Rolls having affirmed the appointment, they appealed to this Court.

Mr. *Martley* and Mr. *F. W. Walsh*, for the appeal, cited *Anonymous* (a); *Wynne v. Newborough* (b); *Turner v. Donegal* (c).

Mr. *Hughes* and Mr. *Hutton*, contra, contended that the Court would not interfere unless there was some absolute disqualification of the person appointed by the Master, and would not entertain a

(a) 3 Ves. 515.

(b) 15 Ves. 283.

(c) 8 Ir. Eq. Rep. 235.

mere comparison of fitness between the gentlemen named; that it was the first instance of an appeal to this Court in such a case; and they argued on the special circumstances to show that the gentleman appointed should be preferred. They cited *Creuze v. Bishop of London* (a); *Garland v. Garland* (b); *Thorpe v. Thorpe* (c); *Pepper v. Foster* (d).

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This case is one of novelty and of considerable difficulty. The nominal rental is upwards of £2000; the real rental is £1000; for the nominal rental is on the assumption that the machinery in question will be let. The consequence is, that the receiver should give security in very different sums, according to the circumstances whether or not he is to be held responsible for keeping up this machinery. It cost a very large sum, £60,000, some years ago. That would be placed in the hands of a receiver who would give no sufficient security for it; for though the security is not yet actually measured, the amount mentioned in the report is inadequate.

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But passing that by, it appears that the Master has selected a gentleman to whom no improper conduct is imputed and to whom no objection is suggested on the ground of conduct or respectability. There is no positive rule against attorneys being receivers. It is sought by implication to include solicitors in the rule. I will not say whether the rule should be extended to include them or not, for I need not now consider that. The Master in his report does not actually say the person to be appointed should be conversant with machinery, and therefore I appoint a solicitor; that would be inconsequential; but he does say that he appoints a person who would require advice and assistance, and that the gentleman appointed has therefore consented to take the advice of some other gentleman. It does not appear that he is under terms, or is bound to act on, or is capable of judging of, such advice. From the form of the undertaking it is difficult to say what its effect would be. There

(a) 2 Bro. C. C. 253.

(b) 2 Ves. jun. 137.

(c) 12 Ves. 317.

(d) 10 Ir. Eq. Rep. 352.

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is no undertaking to give the advice. Will the receiver be protected if he acts on the advice of this irresponsible person? Is he to be bound to follow that advice? and will he be responsible for damage to the property caused by either following it or neglecting it? I would prefer a person who can act on his own responsibility, and not leave open such questions. The difficulty is to find a person who will be competent and will also give the required security. It may be a question whether it would not be proper to allow more than the usual poundage. This report if carried out would create difficulties in the respects I have referred to.

As to Mr. M'Cance, I would have great difficulty in yielding to a motion to appoint him. It is plain that his appointment is the appointment of the defendant himself. It may be proper, under some very peculiar circumstances, to allow the defendant himself to act; but I cannot do it here; and nothing can be more objectionable in the abstract than the appointment as receiver of a man who undertakes to hand over the control to the defendant. I do not say such a course may not be unavoidable here, but it is in general very objectionable. I am not going to prejudge the case. I think it better to send back the report, and let the Master select a person who will be competent to undertake the management of this machinery on his own responsibility. I will not exclude either Mr. B. or Mr. M'Cance; but leave it open to the Master to name any one who will be competent and willing to undertake the management of the property.

The appellant may take back his deposit, and I will give no costs, but the plaintiff may have his costs as costs in the cause.

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SCOTT v. SCOTT.

April 26, 27.
June 28.

JOHN SCOTT, under his marriage settlement, was seised for life of certain lands, with remainder to his first and other sons in tail male, subject to a charge of £5000 for his younger children. He was also seised in fee of the lands of Knopogue, subject only to a mortgage of the fee for £5000, executed to the Bishop of Elphin in 1806; and also of the lands of Manserylane, Crevagh, Dunmore, Lack and Derrycrussane, and of the lands of Cregmoher. He had issue of his marriage an eldest son Bindon Scott, and several younger sons, two of whom were John Scott and William Scott, and also a daughter Diana, who was married to Boyle Vandeleur. John Scott the elder contracted debts to a considerable amount, and made certain provisions for his younger sons.

On the 28th February 1807, a deed was executed between John Scott the elder of the first part, Bindon Scott of the second part, and John Percy and Samuel Spaight of the third part. It recited the marriage settlement of John Scott the elder, and that Bindon Scott was seised thereunder of an estate tail in the lands put in settlement, expectant on the death of his father John Scott; that these settled lands were charged by that settlement with a sum of £5000 for the younger children of the marriage; and that John Scott since his marriage had acquired an estate in the lands of Crevagh and other lands; "which several

S. being seised in fee of K., X and other lands, by deed of February, reciting that he had charged his unsettled estates with £2000 for his daughter, conveyed K. and X to B. his eldest son for life, with remainder to his issue in tail, in consideration of which B. covenanted to pay all S.'s debts and incumbrances. By deed of the 12th of June between S., B. and W. (another son of S.), reciting that S. intended to convey K. to W., he conveyed X to B. and his issue, as in the former deed. Both deeds recited other provisions made for W. and other children in lieu

of charges on estates settled on B. in remainder. By deed of the 13th of June, between S., B. and W., S. conveyed, and B. confirmed, K. to W. for life, remainder to his issue in tail. B. paid off the debts and charges. On the death of S., W. went into possession of K., and so continued until his death. In a suit by the son of B., *Held*, 1.—That the deed of February was for valuable consideration, which extended to the issue of B.—2. That the deed of the 13th of June was a voluntary deed, no consideration moving from W. to S.—3. That even if both deeds were voluntary, the deed of February should prevail; and that neither S. or B., or both of them, could revoke it by a subsequent voluntary settlement.

The futility of a defence resting on an unproved inconsistent prior conveyance, though evidenced by admissions in an answer to another suit, observed on.

Expenditure on the estate claimed, with plaintiff's knowledge, but chiefly in his minority, *Held*, no defence.

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lands he lately, without any pecuniary consideration and as his free gift, conveyed in reversion after his own decease to or in trust for his second son John Scott the younger, and are of the yearly value of £800 and upwards." It then recited that John Scott, also since his marriage, had acquired an estate in the lands of Cregmoher of the yearly value of £300, "which lands he hath lately of his own free will and gift, and without any pecuniary consideration, settled upon or conveyed to his youngest son William Scott." It then recited that John Scott, upon the marriage of his daughter Diana with Boyle Vandeleur, had paid him £3000 as her marriage portion; and that "the said John Scott hath also agreed to charge his undisposed of and unsettled real estate with a sum of £2000 to be paid equally to and among Jane Vandeleur and Elizabeth Vandeleur, the two daughters of the said Boyle and Diana, on attaining their respective ages of twenty-one years, or marriage with consent and approbation of their said father and mother; and which said conveyances of estates to or to the use of or in trust for the said John Scott the younger, and to the said William Scott, and the provision so made for the said Diana Vandeleur and her children the said John Scott doth hereby declare as his intention to be in full lieu of their, the said John Scott the younger and William Scott and the said Diana Vandeleur and her daughters, distributive share and proportion of the said sum of £5000 in virtue of said deed of marriage settlement or otherwise, and in full for any devise, legacy, bequest, charge, or incumbrance by him the said John made by will or otherwise in favour of his said sons and daughter, John, William and Diana, or the children of the said Diana."

The deed then recited that since his marriage John Scott had acquired other real and freehold estates not before mentioned, namely, Knopogue and others, and was also possessed of a personal estate to a large amount, "which said several last mentioned lands, and all other the real, freehold and personal estates of the said John Scott of which he is now seised, and over which he hath now dominion, he is minded to convey to and settle upon his eldest son Bindon for the considerations and to the uses, intents and purposes hereinafter mentioned and expressed; that is to say, to the intent that the said

Bindon shall in the first instance and with all convenient speed pay off and discharge all justs debts due by the said John Scott, now subsisting; and to the intent that the said several lands before mentioned, being the acquired estate of the said John, and not otherwise disposed of, should, subject to the said sum of £3000,* be conveyed to trustees to the use of John Scott for his life; with remainder to Bindon for his life; with remainder to his first and other sons in tail; and with respect to the chattels real and all other the personal estate of John Scott, to the intent that Bindon Scott should stand entitled thereto and apply the produce thereof in the first instance for the payment of the debts of John Scott, and subject thereto, to and for his own use and benefit. The deed then proceeded thus:—"Now this indenture witnesseth that the said John Scott, for and in consideration of the natural love and affection which he hath and beareth to the said Bindon Scott, and also in consideration of the covenants and agreements hereinafter contained on the part and behalf of the said Bindon Scott to be kept done and performed," grants and releases unto John Percy and Samuel Spaight and their heirs, the lands of Knopogue, Manserylane, Crevagh, Carrowgare and other lands, to hold the same to the use of John Scott and his assigns during his life; and after the determination of that estate in the lifetime of John Scott, to the use of Percy and Spaight and their heirs during the life of John Scott, in trust to preserve contingent remainders; and after his decease to the use of Bindon Scott for his life; remainder to the use of the same trustees during his life, in trust to preserve contingent remainders; remainder to the first and other sons of Bindon Scott, in tail male (under which limitation the plaintiff in this cause claimed); and John Scott also assigned all his personal estate to Bindon Scott for his own use and benefit, and appointed Bindon his attorney to call in his personal estate: "Provided always that nothing herein contained shall extend or be construed to extend to impede, hinder or prevent the said John Scott during his life from receiving, recovering, calling in, releasing or discharging or otherwise disposing or assigning the same as fully

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* This is a mistake; for by the former recital it appears to be only £2000.

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and effectually as the said John Scott, his executors or administrators could do: Provided always, that nothing herein contained shall extend, or be construed to extend, to impede, hinder or prevent the said John Scott, during his life, from receiving, recovering, calling in, releasing or discharging the rent or arrears of rent that now are, or shall or may during the life of the said John Scott become, due and owing to the said John Scott out of the lands and premises in his possession, or to which he is or may become entitled during his life, by virtue of these presents or otherwise." And Bindon Scott, in consideration of that release and assignment, covenanted with John Scott, his heirs, executors, administrators and assigns, that he Bindon Scott, his heirs, executors and administrators, would pay all and every the just debt and debts of every kind or nature whatsoever in which John Scott then stood or was indebted, and to the payment whereof he John Scott was personally liable or subject, and which were then subsisting debts, and whether the same were immediately payable by John Scott, or were payable at a future time; and would at all times thereafter indemnify and save harmless John Scott from all costs, charges, damages and expenses which he might sustain or be put to by reason of any such debts; and John Scott covenanted for further assurance.

There was no schedule of debts. This deed was registered on the first of June 1807.

On the 12th of June 1807 a deed was made between John Scott the elder of the first part, Bindon Scott of the second part, William Scott of the third part, and John Percy and Samuel Spaight (who did not execute it), of the fourth part. It recited, though not so fully as the former, the marriage settlement of John Scott the elder, and that by virtue thereof Bindon Scott was seised in tail expectant on the death of his father John Scott; the charge of £5000; the acquisition of the lands of Crevagh and other lands; which lands John Scott had "lately, without any pecuniary consideration and as his free gift, conveyed in reversion after his own decease to and in trust for his second son John Scott the younger;" and that since his marriage, he had also acquired an estate in the lands of Cregmoher, "which lands he has lately, of his own free

gift and without any pecuniary consideration, settled upon or conveyed to his fifth son William Scott; and the said John Scott also intends to settle and convey to the said William Scott, as a further and additional advancement for him, the lands of Knopogue in the said county of Clare." It then recited the provision made by John Scott upon the marriage of his daughter Diana, and his agreement to charge his unsettled and undisposed of estate with a sum of £2000 for her two daughters; and then stated "which said conveyance of estates to or to the use of or in trust for the said John Scott the younger, and to the said William Scott, and the provision so made for the said Diana Vandeleur and her children, he the said John Scott doth hereby declare as his intention and to be in full lieu and satisfaction of their the said John Scott the younger and William Scott, and the said Diana Vandeleur and her daughters, distributive share or proportion of said sum of £5000, in virtue of said deed of marriage settlement or otherwise, and in full for any devise, legacy, bequest, charge or incumbrance heretofore by him the said John Scott made by will or otherwise in favour of his said sons and daughter, John, William and Diana, or the children of the said Diana."

The deed then recited that John Scott had, since his marriage, acquired other freehold lands, as in the former deed (except that it did not mention the lands of Knopogue) and personal estate, which "he was minded to convey to and settle upon his eldest son Bindon, for the considerations and to the uses, intents and purposes thereafter mentioned and expressed." The deed then proceeded in terms similar to those of the former deed as regarded the sons of Bindon Scott, with the same ultimate limitations to John Scott and his heirs, repeating the assignment of the personal estate, the provisoes as to the power of attorney and the covenants by Bindon Scott to pay John Scott's debts.

On the 13th of June 1807 a third deed was executed between John Scott the elder of the first part, Bindon Scott of the second part, William Scott of the third part, and Francis Burton and Samuel Spaight of the fourth part. By that deed, after reciting that John Scott was desirous to settle the lands and premises therein specified

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in the manner thereafter mentioned for the purpose of continuing the same in his blood and family, and for the purpose of making a further provision for the said William Scott, in addition to such provision as he had theretofore made for him by conveyance of the lands of Cregmoher, situate in the county of Clare, "and in which the said Bindon Scott is willing and desirous to concur," it was witnessed, that, in consideration of the love and affection which John Scott bore to his son William Scott and in further advancement of him the said William Scott in life and for and in consideration of the release thereafter contained by and on the part of William Scott, John Scott released and Bindon Scott confirmed to Burton and Spaight and their heirs, the lands of Knopogue, to the use of John Scott for his life; then to the use of William Scott for his life; then to the first and other sons of William in tail male; and in default of such issue, there were various limitations over to all the sons of John Scott and their issue; and in default of such issue, to the right heirs of John Scott. Then followed a power to persons in possession of the estates to charge them with rent-charges not exceeding £200 per annum for jointures, and covenants by John and Bindon Scott with William Scott for title and for further assurance. It was then declared and agreed, "that the said recited conveyance of the said lands of Cregmoher, and the conveyance by these presents of the said lands of Knopogue, with their appurtenances, are intended and are hereby declared to be in full satisfaction and discharge of all claims and demands which he the said William Scott hath, or can or may have, against the said John Scott, or against or upon the real or personal estate of the said John Scott party hereto, by virtue of any settlement or otherwise howsoever; and the said William Scott, for himself, his heirs, executors and administrators, and every of them, doth hereby release, remise and discharge the said John Scott party hereto, his executors, administrators and assigns, and the real and personal estate of the said John Scott and every part thereof, of and from all claims against the said John Scott, or against or upon the real or personal estate of the said John Scott party hereto, by virtue of any settlement or otherwise howsoever."

John Scott the elder continued in possession of the lands of Knopogue and of the rents and profits to the time of his death, which occurred on the 22nd of November 1808. Upon that event William Scott entered into possession, and received the rents up to the decease of Bindon Scott, and, as the plaintiff alleged, by his permission under an arrangement between them and with full knowledge of the rights of Bindon Scott under the deed of the 28th of February 1807. Bindon Scott paid off the debts of his father and, amongst others, the mortgage to the Bishop of Elphin; and by deed of the 21st of September 1811 the lands of Knopogue were reconveyed in fee by the heir-at-law of the Bishop to Bindon Scott. Bindon Scott also, in the years 1814 and 1823, paid off the £2000, the portions settled on Jane and Elizabeth Vandeleur, on their respective marriages.

Bindon Scott died in the month of February 1837, leaving John Bindon Scott the plaintiff his eldest son, and first tenant in tail under the settlement of the 28th of February 1807, surviving.

William Scott, upon his marriage with Jane Jackson in 1815, covenanted by articles to settle a jointure upon her, and in 1840 he accordingly by deed charged the lands of Knopogue with a jointure of £200 Irish currency, in exercise of the power in the deed of the 13th of June 1807; and Mrs. Scott, his widow, one of the defendants, now claimed to be entitled to this jointure.

William Scott died in the month of May 1843, in possession of the lands of Knopogue, and on his death his eldest son, the defendant John Scott, entered into possession.

In 1844, the plaintiff brought an ejectment against the defendant John Scott, for the recovery of these lands. Upon the trial the defendant insisted that John Scott the elder had but an equity of redemption at the time of the execution of the settlement of February 1807, which alone passed thereby; that upon the reconveyance of the mortgage in 1811, Bindon Scott acquired the legal estate in fee-simple, which was barred by the Statute of Limitations against Bindon Scott at the time of his death; and that in a Court of Law the plaintiff could only claim as heir-at-law of his father, and not under the settlement, and was equally barred. The Judge

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who tried the case being of that opinion, the jury under his direction found a verdict for the defendant.

The bill in the present cause was then filed in 1845, stating these facts, and insisting that Bindon Scott, upon the reconveyance, became a trustee of the fee in equity for the plaintiff and all others claiming under the settlement of the 28th of February 1807, whose rights did not accrue until the death of Bindon Scott; and praying that the trusts of the deed of February 1807, so far as related to the lands of Knopogue, might be carried into specific execution, and the plaintiff declared entitled to the possession, and that the reconveyance of the mortgage might be declared to have been so obtained by Bindon Scott as a trustee on behalf of the several persons claiming any estate in the lands or in the equity of redemption under the deed of February 1807, or that the defendants might be compelled, in any ejectment to be brought by the plaintiff, to admit that John Scott the elder was seised in fee-simple previous to the execution of that deed, and for the incidental accounts.

The defendant John Scott, by his answer, made this case, viz., that John Scott the elder having provided sufficiently for all his children except William, by an unregistered deed or instrument which was afterwards lost or destroyed, conveyed the lands of Knopogue to William in fee in the year 1806; that the deed of February 1807 was voluntary and not *bona fide*, as there was sufficient personalty to pay the debts of John Scott the elder, and should not defeat the previous instrument, and that the lands of Knopogue were introduced by the ignorance or mistake of the solicitor; that at all events the consideration could not support the deed beyond the life estate of Bindon Scott; that differences having arisen between the parties, and the deed of February 1807 not being considered as binding, William Scott was prevailed on to give up Manserylane and other lands, in consideration of having the lands of Knopogue secured to him and his issue, and the deeds of the 12th and 13th of June 1807 were accordingly executed; and he submitted that the deed of the 13th of June was therefore *bona fide* and for good consideration.

A case submitted to the late Mr. Justice Burton and his opinion

thereon, relating to these transactions, was given in evidence, and also an answer sworn by Bindon Scott in a suit instituted in 1835, in which he admitted that John Scott the elder "had entered into and executed a certain writing purporting to be a conveyance to the said William Scott in fee-simple of the lands of Knopogue, Manserylane and a third denomination." There was also evidence of payment of debts of John Scott by Bindon, and amongst others of three judgments, and evidence of expenditure on the house and lands by William Scott before the death of Bindon, with the knowledge of the plaintiff.

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The case now came on to be heard on pleadings and proofs.

The *Attorney-General* (Mr. Moore), Mr. *Brewster*, and Mr. *Brereton*, for the plaintiff. *Argument.*

The deed of the 28th of February 1807 was not a voluntary deed, but *bona fide* and for good consideration. Bindon Scott was not liable for the debts of his father, and the covenant to pay them was a sufficient consideration for the limitations to him and his issue, and rendered the deed irrevocable: *Wybrants v. Coutts* (a). There is extrinsic evidence of the consideration which we may rely on: *Pott v. Todhunter* (b). William Scott had full notice of this deed and the trusts of it as his solicitor registered it: *Toulmin v. Steere* (c); *Hargreaves v. Bothwell* (d); *Nixon v. Hamilton* (e): and could not be relieved against it even if he were a purchaser: *Langton v. Tracey* (f); *Stevenson v. Hayward* (g). It is said the deed, even if for valuable consideration, will not operate beyond the limitations to the parties to it; but Courts will not weigh in nice scales the consideration for family arrangements, which they are always disposed to uphold: *Bellamy v. Sabine* (h); *Lady Gorge's case* (i). It is insisted that, if the deed of February be voluntary, it cannot prevail against the deed of the 13th of June, but that deed is

(a) 3 Mer. 707.

(b) 2 Col. C. C. 76.

(c) 3 Mer. 210.

(d) 1 Kee. 154.

(e) 1 Ir. Eq. Rep. 46.

(f) 2 Ch. Rep. 16.

(g) Prec. in Ch. 310; Sug. V. & P. 929.

(h) 2 Phil. 440.

(i) Cro. Car. 550, cited 2 Sug. V. & P. 916.

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itself without consideration if the former be so, and then the first will prevail. Even if the deed of February was voluntary the settlor could not revoke it, because the trusts are actually created: *Bill v. Cureton (a)*; *Page v. Broom (b)*; *Browne v. Cavendish (c)*. The consideration in it is sufficient to support the limitations to the first and other sons of Bindon Scott: *Roe d. Hamerton v. Mitton (d)*; *Pulvertoft v. Pulvertoft (e)*; *Myddleton v. Lord Kenyon (f)*. As to the Statute of Limitations: John Scott the elder conveyed what is in contemplation of this Court the fee-simple, viz., the equity of redemption, and Bindon Scott must be held to have taken the legal fee on the reconveyance subject to the trusts of the deed of February. *Lister v. Turner (g)*; *Thorne v. Thorne (h)*; *Moore v. Hart (i)*; *Collier v. Collier (k)*; and *Jeffreys v. Jeffreys (l)*, and that class of cases are not applicable. The adverse possession did not commence to run until after the death of Bindon Scott, the tenant for life: *Fawcett v. Carpenter (m)*. As to the improvements made, they were all made before the death of Bindon Scott, and during the minority of the plaintiff, and at all events they would only raise a question of compensation: *Sug. V. & P.* p. 1028.

Mr. Serjeant Warren, Mr. Christian and Mr. R. R. Warren, for the defendant John Scott.

There is sufficient evidence of the existence of the prior deed of 1806 to William Scott, and Bindon Scott must have known of it. It was a good consideration for the deed of the 13th of June. The defendant is protected by the Statute of Fraudulent Conveyances; and even if not, the plaintiff has not such a case as will induce the Court to interpose in his favour, but it will leave the parties to their legal rights. The deed of February is voluntary and revocable:

(a) 2 My. & Kee. 503.

(b) 4 Russ. 6.

(c) 1 Jo. & Lat. 606; S. C. 7 Ir. Eq. Rep. 369.

(d) 2 Wil. 356.

(e) 18 Ves. 92.

(f) 2 Ves. jun. 391.

(g) 5 Hare, 261.

(h) 1 Ver. 182.

(i) 1 Ver. 201.

(k) 2 Kee. 98.

(l) Cr. & Phil. 138.

(m) 2 Dow. & Cl. 232.

Davenport v. Bishopp (a); *Cotteral v. Homan* (b); the covenant for the payment of the charges being a mere cover, whereas the deed of June is clearly for a valuable consideration—namely, the release of the portion. At all events, the deed of February will not support the limitations to the issue of Bindon Scott. There is no marriage consideration: *Currie v. Nind* (c). *Roe v. Mitton* (d) is distinguishable; for there the wife joined in the settlement. The plaintiff is therefore neither within the consideration or the contract in the deed. This Court will not give effect to a voluntary equitable agreement where the legal estate is outstanding: *Ellison v. Ellison* (e); *Collier v. Collier* (f); *Jeffreys v. Jeffreys* (g); *Pulvertoft v. Pulvertoft* (h); *Buckle v. Mitchell* (i). The parties have at all events equal equities, and the Court will not interfere between them: *Mitford*, pp. 199, 200. The Statute of Limitations is a bar to the plaintiff's claim, and the defendant has a legal estate not bound by the trusts of the deed of February: *Lewin on Trusts*, p. 20; 4 *Institute*, p. 85; *Gilbert on Uses, by Sugden*, p. 429, n. William Scott expended £5000 on the estate in improvements, with the knowledge of Bindon Scott and the plaintiff, and the defendant has now a right to rely on the length of time and laches: *Stiles v. Cowper* (k); *Dann v. Spurrier* (l); *East India Company v. Vincent* (m).

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Mr. Martley and Mr. C. Coates, for Mrs. Scott, insisted that she was a purchaser for valuable consideration without notice.

THE LORD CHANCELLOR.

In this case the bill has been filed by John Bindon Scott, and it prays that the trusts of the deed of the 28th of February 1807, so

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(a) 2 Y. & C. C. C. 457.

(c) 1 My. & Cr. 17.

(e) 6 Ves. 656.

(g) Cr. & Phil. 138.

(i) 8 Ves. 100.

(l) 7 Ves. 231.

(b) 13 Sim. 506.

(d) 2 Wil. 356.

(f) 2 Kee. 98.

(h) 18 Ves. 92.

(k) 3 Atk. 692.

(m) 2 Atk. 83.

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far as they relate to the lands of Knopogue, may be carried into execution.—[His Lordship read the prayer of the bill.]

This bill is filed by John Bindon Scott, who claims as the eldest son of Bindon Scott, the son of the John Scott who is named in the prayer of the bill. The principal defendant is John Scott, the eldest son of William Scott, who was also a son of the same John Scott: in other words, the plaintiff and the defendant are grandsons of that John Scott. The other defendants are Jane Scott, the widow of William Scott, and her trustees; and the object of the bill is to enforce as against these parties the trusts of the conveyance made on the 28th of February 1807 by John Scott.

The facts of the case are rather numerous, and the conveyances have certainly complicated the interests of the parties in a manner not easy to unravel.

John Scott on his marriage settled certain lands (about which there is no controversy) upon himself for life, with remainder to his first and other sons in tail, subject to a charge of £5000 for his younger children. That charge, as I take it from the bill, was not raiseable until the death of John Scott. In addition, John Scott had large properties which remained unsettled, as far as regarded his marriage settlement; and amongst them he was entitled to the lands of Crevagh, Dunmore, Lack and Derrycrussane, which he gave to John Scott, his second son, as or in lieu of his portion of the £5000. But before I go to the other lands, I think it better to refer to the deed of February 1807.

It appears that John Scott had several children, some of whom were daughters. Of the sons there were John Scott, William Scott and Bindon Scott, the eldest, whose son is the plaintiff. The indenture of the 28th of February 1807 is made between John Scott of the one part, Bindon Scott, his eldest son and heir apparent of the second part, and John Percy and Samuel Spaight (trustees) of the third part. That deed was as follows.—[His Lordship here read the portions of the deed already stated.]

That is the entire of this deed. William Scott is not a party to it, therefore the recital that Cregmoher was settled without consideration cannot bind him, although it may be taken as an

indication of the intention of John Scott the father, that this provision was to be in lieu of his share of the £5000. The statement of the conveyances of estates declared to have been intended to be in lieu of John and William Scott's and Mrs. Vandeleur's shares of the £5000, is not supported in evidence by any proof that there was any other provision made as regards William Scott by will, devise or other act in his favour. Hereafter I will refer to such evidence as there is of a conveyance to him of other lands. But however that may be, John Scott declares that the conveyance made of the lands mentioned was, as far as he was concerned, given in full for his son's share of the £5000.

That instrument being so framed and executed, it appears that in June in the same year two other deeds were prepared and executed, and they are the deeds upon which the defendants rest their rights as against the plaintiff. The first of those deeds bears date the 12th of June 1807, the parties to which are the same John Scott of the one part, Bindon Scott, his eldest son and heir apparent of the second part, William Scott, fifth son of John Scott, of the third part, and Percy and Spaight of the fourth part. They are the trustees in the deed of the 28th of February 1807, and though parties to this deed, they never executed it. This deed proceeds exactly as the former deed to recite the same circumstances, though not so fully. —[His Lordship stated the deed as set forth *ante* p. 490.]

I take it that the declaration in this deed of the conveyance intended to be in satisfaction of the shares of the children ought not to be confined to the conveyance actually made, but may be considered as comprising the intended conveyance to William as well as that before made. I think that the two deeds do not vary from one another, except in the omission of the denomination of Knopogue, and that William Scott joins in this deed as a ratifying and confirming party to the conveyance to Spaight and Percy, the trustees, in trust for Bindon Scott and his issue. But there is no recital in the deed to show why William Scott joined in ratifying and confirming the conveyance, or how his confirmation was necessary to its validity. Upon the face of this instrument his ratification and confirmation can only refer to his interest in the charge of

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£5000, which had no operation upon the unsettled estates, but only affected the settled lands. So far as this deed goes, it does not appear that William Scott was a necessary party to confirm the estate of the grantees.

The next deed, dated the 13th of June 1807, is that upon which the defendant principally relies as giving him the estate. It is made between John Scott of the first part, Bindon Scott, his eldest son, of the second part, William Scott, his fifth son, of the third part, and Francis Burton (a new trustee) and Samuel Spaight of the fourth part. That deed is as follows.—[His Lordship read the portions of this deed already stated pp. 491, 492.]

These are the deeds upon which the questions in this case turn, and they are these:—First, whether the deed of February 1807 is to be considered as a deed for valuable consideration? Secondly, whether the consideration, as between the parties now before the Court, is to be taken as extending to the unborn issue of Bindon Scott the son? Thirdly, even supposing that deed to have been voluntary, whether, as between the son of Bindon and the son of William, that deed is or is not to have priority and precedence over the subsequent deeds?

The case comes before a Court of Equity by reason of the circumstance that the legal estate in fee in the lands of Knopogue was outstanding in a mortgagee at the time of the execution of those respective conveyances; consequently, though they were conveyances to trustees and so far executed trusts, they had not the protection to be obtained by the acquisition of the legal estate. But as far as the deeds themselves are concerned, they are conveyances upon executed trusts; and nothing remains in contract so as to require the aid of a Court of Equity.

The legal estate remained outstanding in the mortgagee for a long time; but at last it was got in; and it is very immaterial for the present consideration whether it was got in by payment of the mortgage money, or as a dry outstanding legal estate, as rather appears to have been the case: for whichever it was, Bindon Scott did get in the legal estate and took a conveyance of it as heir of John Scott his father. If matters had rested there, the plaintiff

as heir-at-law of Bindon Scott would have had the legal estate, and whatever equities and advantages under the deed of 1807 he would derive from it. But it appears that, by the conveyance of the 13th of June 1807, William Scott got into actual possession and seisin of the lands; and Bindon being debarred by his conveyance of the 12th of June 1807 from bringing an ejectment after the acquisition of the legal estate to evict William, nothing could be done until after the death of Bindon. Shortly after that event an ejectment was brought by the plaintiff as heir-at-law, to evict the title of William Scott. That ejectment was resisted upon this ground, that, William having acquired the actual possession, a Court of Law would not recognise the trusts; and twenty years having elapsed from the time he got that possession without suit, the Court of Law held it would only regard the legal estate and, that being barred by the Statute of Limitations, he failed in that ejectment; and the present bill in one aspect is brought as if it had been originally against William and those claiming under him, to prevent them setting up this bar of the Statute of Limitations.

The question is propounded in the alternative, either that I should now declare the rights of the parties and the title to the possession under the deed of February 1807, or remove the legal bar by giving the declaration required by the prayer of the bill, namely, that John Scott was seised in fee at the time of the execution of that deed. The latter would enable the plaintiff to try at law all the questions between the parties; for then there would be no difficulty in laying proper demises and having the questions between the parties settled by a Court of Law. But in considering that question, it is impossible to avoid at the same time considering what are the real rights of the parties and declaring them; and I think it is incumbent on the Court, having the whole case before it, to give that opinion, and either to make a declaration accordingly or, if the parties shall still think fit, to give them an opportunity to try the case at law.

The first question is, what is the nature of the deed of February 1807? It is certainly an instrument which, if nothing further took place, would be binding on John Scott and his heirs, and would be

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so, whether voluntary or made for value. But, looking at all the circumstances of the case and the evidence given, I think it must be considered as made for valuable consideration as between Bindon Scott and his father, John Scott. It is not the habit of the Court, either at law or in equity, to scrutinise minutely the value given for an estate, particularly where the deed is not merely between a vendor and purchaser, but is a deed of family arrangement and apparently just on the face of it. Now what is the consideration here given by Bindon Scott? It is said, I am to consider this as a mere mockery; that it was a delusion, and inserted for the purpose of giving colour to the transaction. I see no reason to suppose that, or that the parties intended to do any thing but to carry out their original substantive intention. The father acquired large estates; he made provision for his younger sons and, having remaining other estates and being incumbered, he gives the residue of his unsettled estates to his eldest son, he entering into a covenant to pay all the debts which his father owed. It is too late to scrutinise with great accuracy whether the son did get an estate equal to discharge that obligation or whether there was a surplus or not. I do not think I have a right to go into that consideration. Very slight consideration is sufficient in an instrument of this nature. The rule is expressed by Lord Denman in *Doe v. Rolfe (a)*, in these words:—"It is difficult to reconcile all the cases upon this subject, or rather, to extract from them any clear principle for our guidance. The inclination of the Courts appears to have been always to support a fair settlement in favour of the persons intended to be benefited by that settlement, and to treat nearly any consideration as sufficient for that purpose." That, I believe, is the latest case in a Court of Law upon the subject. The principal question in it appeared to be, whether the concurrence of a necessary party in a conveyance was a sufficient consideration to support a limitation to a person who would otherwise be a volunteer; and the Court held it was not, nothing appearing on the face of the instrument to show that the limitation emanated from or at the desire of the person who so joined in the conveyance. I refer to that case rather for the

(a) 8 A. & E. 672.

declaration of Lord Denman, which I have read, than for the decision in the case itself. Sir Edward Sugden observes that the reasoning in it, on which the decision proceeded, is not altogether satisfactory, but that does not affect the purpose for which I cite it.

Taking this instrument by itself, can it be said that it was no part of the contract between the parties that the estate should go to the first and other sons of Bindon Scott? It was a natural contract for a grandfather to make, that the estate should go in the line of his eldest son; and he might well have said, "I will not give you the estate even for the consideration expressed, unless you assent to its being settled on your issue in tail." Bindon Scott might also reasonably say, "I will not enter into this contract merely for getting a life estate, but I will also require an estate for my sons in tail." Who can tell what was the mode in which this contract was propounded? But there it is—an instrument which is capable of the explanation I have given to it, a contract to which the eldest son must be considered to be a party and, according to the opinion of Lord Eldon in *Pulvertoft v. Pulvertoft* (a), a case in which the issue in tail may be deemed to be within the consideration. Here there are more considerations than one. There is a money consideration, which may embrace more persons than the person paying and is not like a marriage consideration, which will not in general bring within the range of its limitations to the collateral branches of the family. If that be so, if this be a contract for valuable consideration, what has occurred to displace it? I have here before me, as claiming by a subsequent conveyance, a person who is not a purchaser for value given to the father John Scott; for though it is contended that William Scott became the purchaser of this estate, I am at a loss to find in the deed of June 1807 any consideration moving to his father from him. Bindon Scott; to whom the consideration did move, namely, the discharge of his estate under the marriage settlement from the charge of £5000, cannot be considered as a conveying party. The conveying party is John Scott. He had settled the estate upon his eldest son and his issue. Was any new consideration given to him by the conveyance to William Scott, or by the release.

(a) 18 Ves. 92.

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from William of Bindon Scott's estate? That was no consideration to John Scott. What new consideration did John Scott get? He got none; no consideration at all from William, for he speaks of this as a mere voluntary transaction on his part. He got his full consideration by the deed of February and by the first deed of June. Therefore I see no new consideration to John Scott in the second deed of June 1807 so as to make it a deed for value. But suppose there was a consideration from William to John in the deed of June, then the same question arises between these parties—did that consideration extend to the issue of William, who are now the parties before the Court? It is the same question as that I have alluded to as regards the issue of Bindon Scott, whether they are within the consideration given for the deed of February 1807. I think, if there was value, that it would have extended to the issue of William, as well as the consideration for the deed of February 1807 extended to the issue of Bindon. They both stand on the same grounds; and standing in the same position, if the issue of William can be considered purchasers for value under the deed of June, the issue of Bindon must be considered as prior purchasers for value under that of February, or else they are, at the worst, both volunteers, and in that view the prior deed is to be preferred. Therefore as between those instruments I am bound to come to the conclusion that the deed of February 1807 was made for value to John from Bindon; the eldest son of Bindon cannot be excluded from the benefit of that consideration by the effect of the subsequent conveyance to William; and upon the face of the instrument, I think there is evidence that it was part of the contract between the parties that the estate should be limited to the issue of Bindon; and also, as between the two deeds, taking it in any way, there is no consideration in favour of the issue of William better than that for the issue of Bindon, so that, even if both be volunteers, then the deed to Bindon is prior in point of time and was registered before that to William.

The question then is, these parties having in one sense equal rights and Bindon having the better equity of the two, is there any thing to show that there was really a prior title as against both the deeds, of which the defendants here can have the benefit? It is

said there was a prior conveyance by John Scott of these lands to William Scott, and that that explains the intervention of William, and his ratification and confirmation of the deed of June 1807 to Bindon Scott, and that the defendants here have a right to fall back on the prior conveyance to William in support of their title. If that conveyance had been proved, the case might have assumed a different aspect. But it is not in existence; it is not registered; it is not alluded to in any of the deeds; it is not treated by William as a deed upon which he places any reliance. On the contrary, every thing in those deeds, except the introduction of William Scott as a confirming party, is wholly inconsistent with the notion that there was a valid conveyance of those lands by John Scott to William Scott. John Scott does not refer to it in the deed of February 1807; he does not appear to have been a man devoid of attention to his affairs, and it is difficult to suppose that he would have executed that deed without referring to the prior instrument, if it existed. He recites that the only provision he had made for his son William were the lands of Cregmoher. There is no allusion to that prior deed in the deeds of June 1807; but the estate is treated by them as the absolute estate of John Scott—as his to give, not merely by way of sale, but by way of further advance to his son William. There is no evidence on these deeds that this alleged conveyance to William was ever the foundation of title in William as against the other instruments; and his own acts almost amount to an estoppel against his claiming in opposition to the deeds of February and June 1807. If that prior deed to William was a conveyance in fee to him, he, after the execution of the deeds of 1807, could not have set it up against his son. I look upon these deeds as a declaration on his part, that he was taking what was thereby given to him as his full advancement, and that his mouth is stopped from claiming more.

But it is said that it is sworn by the plaintiff that there was such an instrument. I am unwilling to rely upon admissions, even upon oath, which are not supported by other evidence. But upon looking at the answer relied on, it is difficult to draw any conclusion as to the nature of the instrument there mentioned. It is an answer

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sworn by the plaintiff when his father was alive. All he says is, "that he heard and believes that John Scott the elder, at or about the time in the original bill mentioned, was under the circumstances thereafter mentioned induced to and did enter into and execute a certain writing purporting to be a conveyance to the said William Scott in fee-simple of the lands of Knopogue, Manserylane and a third denomination, in addition to the lands previously conveyed; but this defendant does not believe that the said John Scott was desirous to make a further provision for the said William Scott but believes that said last mentioned writing was prepared by Richard Evans, but not by the directions of the said John Scott the elder." In that statement, is there any thing distinct which the Court can lay hold on, whence it can infer that there was a conveyance actually executed by the father? It is all upon hearsay and belief, and he does not say that he ever saw the deed. He only speaks of it as a certain writing purporting to be a conveyance. What it was, it is impossible to say. There is nothing in the answer more distinct or satisfactory than that. But the answer to all that is, that in truth this alleged instrument is not made the basis of any of the deeds. I put out of sight all the parol evidence; I do not think it safe for the Court to speculate from parol instructions or bills of costs as to what was the intention of the parties, when we have the deeds themselves not referring to this instrument.

That being so, it occurs to me that there is nothing in this case to deprive the plaintiff of his equitable title under the deed of February 1807. It was argued, that notwithstanding that settlement it was competent to John and Bindon Scott to destroy that instrument—to revoke that settlement—at any time afterwards, and re-settle the estates. I am not prepared to concur in that proposition. It is not competent for a person executing a voluntary settlement to execute a new voluntary settlement to the prejudice of the former one. John Scott the settlor could not execute a subsequent voluntary settlement to the prejudice of his prior voluntary settlement; then why should he, in combination with his son, have power to do that which he himself could not do? I agree that John Scott (if the deed of February 1807 were not for value)

might put an end to it by making a conveyance for value; but I am not prepared to hold that either John or Bindon Scott, separately or both together, could destroy it except by a conveyance for value; and the cases cited by Mr. *Christian* do not bear out any such proposition. The case of *Davenport v. Bishopp* (a) does not support it. All that the Vice-Chancellor says, is: "I apprehend that if two parties, in contemplation of a marriage intended and afterwards had between them, or for any other consideration between themselves coming under the description of valuable, have entered into a contract together, in which one of the stipulations made by them is a stipulation solely and merely for the benefit of a third person, that third person being even a stranger in blood to each—a stranger to the contract—and a person from whom not any valuable or meritorious consideration moves, has moved or is to move, it cannot, generally speaking, be competent to one party to the contract, or to those representing that party in estate, to say to the other party to the contract, 'whatever may be your wishes, whether you assent or dissent, that stipulation shall go for nothing, or shall not have effect given to it.' The two parties to the contract having made the stipulation with each other, mutual assent must generally be requisite to dissolve that which, by mutual consent, was created. With the question between them, the gratuitousness of the provision towards the stranger, as far as the stranger is concerned, seems generally to have little or nothing to do." It is clear that the Vice-Chancellor is there supposing a case in which the third person is a stranger to the contract, and from whom no valuable or meritorious consideration moves, has moved, or is to move. What might be the case in reference to a contract merely for the benefit of a stranger, I am not called upon to say; this case does not decide that, although it may no doubt be implied from the language of the Vice-Chancellor that in such a case both parties concurring could displace that part of the contract; but he is speaking of the case of an executory contract, as the case before him was, and considering only what the parties to it might do in carrying that contract into execution; not of a case like this, where nothing

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(a) 2 Y. & C., C. C. 451.

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remained executory, but rights and estates have been created by actual conveyance.

The other cases are those where there has been an actual purchase for value. *Cotteral v. Homan* (a) was a case of that kind. It arose on a limitation in a marriage settlement to collaterals. The wife died without issue, and the question was solely as to the limitations to the collaterals; and it was held that they were volunteers, and therefore that the settlement was void as against purchasers. All that that case decided was, that the conveyance by a *feme covert* was within the statute of *Elizabeth*. *Currie v. Nind* (b) is to the same effect. It was the case of a postnuptial settlement; it merely followed the former case in holding that a *feme covert* was within the statute as well as her husband. These cases therefore do not support Mr. *Christian's* position.

Upon all these grounds, I am of opinion that the rights of the parties are as contended for on the part of the plaintiff; that he stands in the position of a person deriving under a settlement for valuable consideration; that he is encountered by a settlement which is not for valuable consideration as to the conveying party, viz., John Scott; and that as between the plaintiff and the defendant, the plaintiff has a better equity, and therefore I think he is entitled to the aid of this Court.

After all, the question here is not for a conveyance of the legal estate—I mean that legal estate which was amenable to the trusts of this property. But supposing that legal estate now remained outstanding in the mortgagee, who would have the better right to call for it? I take it that the plaintiff would, according to *Ex parte Knott* (c); *Dearden v. Lord Byron* (d). In the view I take of this case the plaintiff has priority in point of time and a better equity.

The legal estate has however in fact been got in. It occurred to me during the argument that it should have been competent for the plaintiff in the ejectment to show the character of the possession obtained by the defendant. I have great difficulty in saying that,

(a) 13 Sim. 506.

(b) 1 My. & Cr. 17.

(c) 11 Ves. 618.

(d) 8 Pri. 417.

if a tenant for life of an equitable estate gets in the legal estate, the Statute of Limitations may be used, as in this case, to the prejudice of the remainderman, relying on that legal estate in his character of heir-at-law. I have great difficulty in that. But it is not for me to refer to that part of the case. The Queen's Bench has decided that this legal estate was barred; but that is no answer in this Court to the claim of the plaintiff. The plaintiff here has shown clearly that that legal estate could not be made use of in the lifetime of Bindon Scott; for Bindon Scott had at all events conveyed away his life estate to William. The plaintiff is not barred in this Court when he shows that Bindon Scott was estopped at law from bringing an ejectment during his life on that legal estate. I think if this bill had been filed to aid that ejectment, the defendant would have been restrained from relying on that bar.

The only remaining part of the case, as between the plaintiff and John Scott, is as to the allegation of his lying by. He was born after the execution of the deed, and did not attain his age until 1832, nor did his title accrue until the death of his father in 1837. The possession appears to have been taken in 1807. Expenditure is sworn to; but it is clear that all the important expenditure must have been during the minority of this plaintiff; and there is no distinct evidence of any subsequent expenditure. But during all this time, Wm. Scott was aware of the title under the deed of February 1807. The passage cited from the case of *The East India Company v. Vincent* (a) turns upon this, that the party not only concealed his intention to claim the property, but the other party was ignorant of his rights. In the cases of *Stiles v. Couper* (b), and *Shannon v. Bradstreet* (c), there was expenditure in the time of the remainderman after the death of the tenant for life. But there is nothing here to satisfy me that there was any substantial expenditure after the present defendant came of age. In 1845, he put forward this deed of February 1807, and he also swore to payments having been made by his father of debts of John Scott; and it appeared in evidence in this case that there were debts of John Scott discharged by Bindon Scott. If he discharged them, he

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(a) 2 Atk. 83.

(b) 3 Atk. 692.

(c) 1 Sch. & Lef. 52.

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 —
Judgment.

performed his covenant *pro tanto*; and the party claiming under that deed has, in my opinion, a right to rely on it.

Under all these circumstances, my view of the case is in favour of the plaintiff; at the same time the case involves questions of some novelty. I believe there is no case in which a question like this has directly arisen in a Court of Law. The case *Doe d. Ravenstock v. Rolfe* (a) does not govern the present. I have given my opinion upon the subject; but this bill is in the alternative, that I should decide the questions, or send the case to law. I am ready, if the defendant desire it, to remove the temporary bar and send the case to a Court of Law, and though I have stated my view of it, I do it with some hesitation.

With regard to Mrs. Scott, if the deeds of 1807 were voluntary, she by her marriage would have given value for the second deed of June 1807, so as to sustain it in her favour. But that is met by the view I have taken of the deed of February 1807 being a deed for value. If it be a deed for value, the right of Mrs. Scott cannot stand in the way of the plaintiff claiming under it; it is registered, and must have priority. In the view I have taken of the case the plaintiff is entitled to the relief he seeks—viz., possession of the estate, and to an account of the rents for six years before the bringing of the ejectment. I would say it is not a case for costs on either side. I have not adverted to the argument derived from the conveyance of the legal estate, argued under the Statute of Limitations; but it does not appear to me that the conveyance of it to the defendants makes any difference in the case.

Mr. Serjeant *Warren*, for the defendant, asked that the alternative relief should be given by removal of temporary bars, and the plaintiff left to proceed at law.

The LORD CHANCELLOR made the decree in that form, but in consequence reserved the costs.

Reg. Lib., 99, fol. 379, 1848.

(a) 8 Ad. & El. 650; 3 N. & P. 648.

1848.
Chancery.

ARTHUR v. ARTHUR.

June 4.

AN instrument was executed in 1833 on the marriage of Thomas Arthur and Margaret Curtis, between Thomas Arthur of the first part, Margaret Curtis afterwards his wife of the second part, and John Lippey and George Arthur of the third part, by which, after reciting the intended marriage, it was witnessed that "on and by the solemnisation of said marriage the aforesaid Thomas Arthur does agree to and with the said Margaret Curtis, John Lippey and George Arthur that he will pay unto them or either of them, their heirs, executors, administrators or assigns, the whole and the entire sum of £100 sterling, present currency, for the full and sole use and benefit of the said Margaret Curtis during her life, and the interest or residue remaining at the time of the decease of the aforesaid Margaret Curtis shall then revert to and for ever remain with the child or children lawfully begotten by the virtue and benefit of said marriage between the aforesaid Thomas Arthur and Margaret Curtis."

Thomas Arthur and his wife lived together until his death. He supported her, but no payment was ever made to her or the trustees for her separate use. Thomas Arthur having died in September 1846, and a suit having been instituted for the administration of his assets, his widow claimed the sum of £100 and interest thereon from the 30th day of November 1833, as due to her on foot of the foregoing articles. The Master having disallowed the claim for arrears of interest, the widow excepted to the report.

Mr. Serjeant *Warren* and Mr. *Ince*, in support of the exception, contended that the sum settled by the marriage articles was the separate estate of Mrs. Arthur, and being admittedly unpaid she was entitled to claim it. As to the quantum of arrears, they contended that there was a distinction between a fund given generally

A covenant to pay £100 for the full and sole use of an intended wife during her life, and that the interest or residue remaining at her decease should go to the children of the marriage, makes the fund settled the separate estate of the wife.

Where a married woman has been supported by her husband no retrospective account is given of her separate estate against his assets, and there is no distinction whether it be pin-money or not, or whether it is secured by articles remaining *in fieri* or an executed trust.

Argument

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to the separate use of a married woman and pin-money, and that, though a retrospective account of the latter might not be granted where she had lived with her husband, the rule did not apply to the former; and also that, as the £100 had never been paid to the trustees by the husband, the articles were still *in fieri*, and in all the cases in which a wife had been refused a retrospective account because supported by her husband the fund had been actually vested in trustees for her, and *Parker v. Brooke* (a) was decided on this distinction. They cited *Howard v. Digby* (b); *Parker v. Brooke* (c); *Ex parte Killick* (d); ——— v. *Lyne* (e); *Johnes v. Lockhart*, cited in *Ex parte Ray* (f).

Mr. *Christian* and Mr. *Scully*, contra, contended that the articles did not give the money claimed to the separate use of Mrs. Arthur, the intent being only to provide for her and her children surviving her husband: *cas. cit.* in note to *Lee v. Prieaux* (g); but that at all events all the arrears of interest to the husband's death must be treated as paid, Mrs. Arthur having lived with her husband and been supported by him; and that no distinction between gifts to the separate use of a married woman could be raised on their being termed pin-money or not, or the articles being *in fieri* or executed: *Powell v. Hankey* (h); *Townshend v. Windham* (i); *Carter v. Anderson* (k).

THE LORD CHANCELLOR.

Judgment.

The Master's report must be confirmed. So far as depends on the question of construction, I think that this was the separate estate of Mrs. Arthur, and that those articles if carried into execution would have authorised a settlement of the property to her separate use. "Sole" use must mean that it was to be free from the control of her husband, and that is the meaning put on those

(a) 9 Ves. 583.

(c) 9 Ves. 583.

(e) Yo. Exch. 562.

(g) 3 Bro. C. C. 385.

(i) 2 Ves. 1, 7.

(b) 8 Bli. N. B. 224, 245.

(d) 3 Mont. D. & D. 480.

(f) 1 Mad. 207.

(h) 2 P. Wms. 82.

(k) 3 Sim. 370.

words in *Ex parte Ray* (a) before the Vice-Chancellor :—"Taking the words 'sole use' by themselves, they must have the same meaning as 'separate use;' omitting the word 'sole' the property would go to the husband; but I am not at liberty to reject that word. 'Sole' means 'solely hers'—for her sole benefit. It is an emphatic and operative word."

I have therefore no doubt on that point. I would be glad to rule the other point involved in the exception also for the exceptant; but the cases cited show clearly that where a wife has lived with her husband, her separate income received and expended by him while he maintained her cannot be recovered over again; and it is so laid down in the text-books. For example, in *Maddock's Ch. Pr.* (b) it is stated that "where a husband and wife live together she is not entitled to an account of her separate estate against his creditor and assignee, nor against his representative, any further back than from the death of the husband, unless he promised to pay the arrears." The latter is not the case here. I do not rely on the distinction between pin-money and separate estate; that distinction is observed on in the note to *Ex parte Elder* (c); but I do not rely on it for this purpose. The authorities there cited do appear to establish that where a husband has been permitted by his wife to receive the income of her separate estate, she, on an account prayed against him, shall not have the account carried back beyond a year. The authorities there reviewed differ only as to this—whether the account should be carried back even for a year; but beyond that no doubt is suggested.

I cannot regard the language of Lord Brougham, in the case in the House of Lords (d), as deciding this point against the current of authority. I must therefore confirm the report.

Reg. Lib. 99, *fol.* 340, 1848.

(a) 1 Mad. 207.

(b) 1 Mad. Ch. Pr. 732-3; see also p. 618.

(c) 2 Mad. Rep. 286, *note*.

(d) *Howard v. Digby*, 8 Bli. N. R. 224, 245, &c.

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KIERAN v. CORR.

October 21.

The saving in the 22nd section 3 & 4 Vic. c. 105, of the rights of incumbrancers prior to the 1st of November 1840, is solely for their protection; and therefore in a suit by a judgment creditor for a sale of the conusor's lands in his lifetime, he cannot rely on the existence of such incumbrances if the owners of them do not object.

Semble, this Court will sell an estate subject to incumbrances.

Argument.

THIS was a suit by a judgment creditor for a sale of the lands of the conusor in his lifetime. There were several other creditors on foot of judgments affecting the lands, recovered before 1840, some of which were prior and some puisne to the plaintiff's. They were in possession by a receiver under the Judgment Acts. The bill contained the usual offer to redeem such parties as the plaintiff should be bound to redeem. The defendant, the conusor, insisted in his answer that the bill should be dismissed, because of the existence of the other judgments prior to 1840, and therefore coming within the proviso in the 22nd section of 3 & 4 Vic. c. 105.

There were some parties made defendants in respect of a family charge, who, it was admitted, were improperly made parties, if the charge was not raisable immediately. It was at first contended that it could be raised immediately, but this was not much pressed.

Mr. *Christian* and Mr. *F. W. Walsh*, for the plaintiff, contended that none but the prior creditors themselves could rely on the proviso in the 22nd section of statute 3 & 4 Vic. c. 105, and the debtor could not take the objection; that even if the creditors did object, the Court might decree a sale subject to their demands: *Carlton v. Farlar* (a); but to remove all objection the plaintiff was willing to redeem them if they should require it.

Mr. *Hughes* and Mr. *W. Bourke*, for the inheritor, insisted that a bill by a judgment creditor for a sale in the lifetime of the conusor could not be maintained at all where there were creditors prior to 1840, in consequence of the provision in the 22nd section of the 3 & 4 Vic. c. 105, and that this objection might be raised by the

(a) 8 Beav. 525.

conusor or any other party to the cause : *Crofts v. Poe* (a) ; *Kirwan v. Lord Portarlinton* (b) ; and that it was against the settled rule of the Court to sell an equity of redemption or an estate subject to incumbrances, and thus the existence of incumbrancers whom the plaintiff could not compel to accept payment out of the proceeds of the sale rendered the relief sought impossible.

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Argument.

Mr. *Burroughs*, for some prior judgment creditors, stated that they would raise no objection if they were redeemed.

THE LORD CHANCELLOR.

I think the charge under the settlement is not raisable until after the settlor's death, so the question does not arise on the claims of the children and trustees representing that charge. The bill must be dismissed against them with costs, and there is no reason why those costs should be given over.

Judgment.

I cannot yield to the argument that the proviso in the 22nd section of statute 3 & 4 Vic. c. 105, protects any parties except the purchasers, mortgagees or creditors themselves, and I do not think the debtor can rely upon it. I do not see any objection in principle to following the course pursued in *Carlton v. Farlar* (c), and selling the estate subject to the prior incumbrances. No decree is now to be made for a sale, but when the final decree is ultimately made, I do not see why the Court cannot do what people do every day out of Court. It is a common transaction to lend money upon estates subject to prior incumbrances, or purchase them so subject. But it is not necessary to decide that now, nor will the difficulty arise, for the plaintiff is willing to redeem the prior incumbrancers, and they will submit to be redeemed. So there must be a decree to account.

The decree, after dismissing the bill with costs against the parties in respect of the family charge, and stating that the defendants

(a) 1 Jones, 540.

(b) 8 Ir. Eq. Rep. 593.

(c) 8 Beav. 525.

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(judgment creditors) submitted to be redeemed, the plaintiff undertaking to redeem them, referred it to the Master to take the usual accounts in a judgment creditor's suit.

Reg. Lib. 100, fol. 121, 1848.

PURCELL *v.* PURCELL.

Nov. 9.

Where a cause is set down for a dismiss, the defendant setting it down is alone entitled to costs, and any other defendants appearing will not get costs.

THIS was an administration suit. One defendant had set down the cause for a dismiss, and the plaintiff not appearing, the bill was dismissed with costs payable to that defendant. Counsel appeared for other defendants and asked for costs also.

Mr. *Leahy* appeared for the defendant who set down the cause.

Mr. *Hunt* and Mr. *Clarke*, for other defendants.

The LORD CHANCELLOR said he would give costs only to the defendant who set down the cause, and not to any other defendant.

Reg. Lib. 100, fol. 166, 1848.

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Rolls.

DOYLE v. DUMONCEL.

(In the Rolls.)

July, 21, 23.

THE demurrer taken to the bill in this case having been allowed (see *ante* p. 354)—

Mr. *Drury*, for the plaintiff, now moved that the injunction obtained by the plaintiff might be dissolved, and that the Accountant-General should draw in favour of the plaintiff for the sum of £666, lodged in Court previously to the execution of the injunction. He cited *Blennerhassett v. Scanlan* (a); *M'Kiernan v. Kernan* (b).

An action of covenant was brought against a trustee, who lodged the amount claimed in Court, and filed a bill of interpleader, which was dismissed with costs on demurrer. Held, that the trustee was entitled to have the money returned without deducting the costs.

Argument.

Mr. *Hughes* (with whom was Mr. *Orpen*) moved a cross notice that the said sum might be paid to the defendant C. B. F. Dumoncel, in part discharge of the annuity; or that it might be impounded until the plaintiff entered an appearance, or gave a plea of confession at law, the defendant undertaking not to mark judgment thereon until the 4th of November, and that a sufficient sum might be impounded to meet the defendant's costs of this suit.

They distinguished this case from *M'Kiernan v. Kernan*, as the plaintiff's right was ascertained by the deed of January 1840, and the costs had been decreed to be paid by the Court. The question as to the costs was not decided in *M'Kiernan v. Kernan*.

THE MASTER OF THE ROLLS.

The case of *Blennerhassett v. Scanlan* (c), before Sir W. M'Mahon, is in point, and has been followed by the late Master of the Rolls

July 23.
Judgment.

(a) 1 Hog. 363.

(b) 8 Ir. Eq. Rep. 145.

(c) *Ubi sup.*

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Judgment.

in *M'Kiernan v. Kernan*. I shall therefore make an order in favour of the plaintiff for the money.

Be it so on the original motion, and refuse the cross motion with costs, to be paid by the said defendant C. B. F. Dumoncel.

Nov. 13, 17.
Dec. 21.

In the Matter of ELIZABETH CHAMBERS, a Minor.

A sum of £8000 was bequeathed in trust for E. for her separate use for life, and at the decease of E. that two-thirds of the sum should be and remain for the use of the child and children of the said E., and the remaining third thereof she should be at liberty to

dispose of by her last will and testament; and failing such disposition, that the said remaining third should go to the use and benefit of the said child or children in equal proportions. By a settlement, executed upon E.'s marriage, she, according to her right and interest therein, and in consideration of the marriage, assigned to trustees the said sum of £8000 in trust, after the decease of the survivor of E. and her husband, in case there should be issue of the marriage one or more children, to pay it over among such issue as they should by deed or will appoint; and in default of appointment, to the issue in equal shares; and E. covenanted for further assurance. There were two children of the marriage. E. by her will, in virtue of the power and authority given her by the will of her father, and of all other powers and authorities enabling her in that behalf, devised and bequeathed one-third of said sum of £8000 in trust to pay two legacies to strangers; and as to the residue of said one-third, in trust for the use of one of the children, whom she also appointed residuary legatee.

Held, that the will of E. was an ineffectual appointment of the one-third so far as it was inconsistent with the trusts of the settlement, and therefore the appointment of the two legacies to strangers was void; but that the appointment of the residue to the child of E. was valid.

The donee of a power, although to be executed by will only, may bind himself not to execute it, or not to execute it except under certain restrictions.

A petition was presented by Thomas Chambers on behalf of the minor, to bring before the Court a special finding in the report of the Master, made under an order of reference of the 13th of January 1847.

By that order it was referred to the Master to enquire and report the nature and amount of the fortune of the minor, and to approve of fit and proper persons to be guardians of her fortune. The order also contained the usual directions as to maintenance, &c.

The Master made his report under the order bearing date the 12th of July 1847, and thereby, amongst other things, found that

Isaac Todd (since deceased) by his last will and testament, bearing date the 10th of June 1815, bequeathed to trustees the sum of £8000 late currency, in trust for the use and benefit of his daughter Elinor, the mother of the minor, for her separate use for life; and that at the decease of his said daughter two full third parts of said sum of £8000 should be and remain for the use and benefit of the child and children of the said Elinor, if any she should have, and the remaining one-third thereof she should be at liberty to dispose of by her last will and testament; and failing such disposition, that the said remaining one-third part should go to the use and benefit of her said child or children in equal proportions.

The report further found that Isaac Todd died in the year 1819, without having altered his will, leaving his daughter Elinor him surviving; and that the said Elinor, after she attained her age, married in the year 1823 John Chambers, since deceased; and upon that marriage a deed of marriage settlement was executed, bearing date the 22nd of October 1823, between the said John Chambers of the first part, the said Elinor of the second part, and James Shaw Wilson and Hall Chambers (trustees) of the third part, whereby, after reciting as therein, and more particularly that the said Elinor had agreed to settle the said sum of £8000 upon the trusts therein and hereinafter mentioned, it was witnessed that the said Elinor, according to her right and interest therein, and in consideration of the marriage, assigned unto the trustees the said sum of £8000 upon the uses and trusts therein particularly mentioned, and, amongst others, upon trust (after the celebration of the marriage) to John Chambers for life, and after his decease to the said Elinor for life, and in lieu of dower; and after the decease of the survivor, in case there should be issue of the said intended marriage one or more child or children, then in trust to pay over and apply the said sum of £8000 to and amongst such issue, if more than one, at such times and in such manner and proportions as the said John Chambers should by deed or will, executed in the presence of two or more witnesses, appoint; and failing such appointment, in such shares and proportions as the said Elinor should by deed or will in like manner appoint; and failing such appointment, to the issue

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of the marriage in equal shares and proportions: and the said indenture contained a covenant on the part of said Elinor for further assurance.

The report further found that the marriage took effect, and that there was issue thereof two children—namely, Ellen Kennedy, otherwise Chambers, and the minor Elizabeth Chambers, and no other issue; and further found that, sometime in the month of December 1834, the said sum of £8000 was invested in the purchase of Government stock amounting to £7489. 17s., which was transferred to the separate credit of Hall Chambers, Edward Chichester and Hamilton Stewart, as trustees.

The report further found that John Chambers died in the month of March 1845, without having in any manner exercised the power of appointment given him by the settlement of 22nd October 1823, and that Elinor Chambers departed this life on or about the 26th day of December 1846, having previously made and published a certain paper writing purporting to be her last will and testament, which will, although not so found by the report, was duly attested; and the report found that she did thereby (in virtue of the power and authority given her by the will of her father the said Isaac Todd, and of all other powers and authorities enabling her in that behalf) devise and bequeath the one-third part of the said sum of £8000 to Hall Chambers and Richard Babington, in trust to pay two legacies of £150 each to persons therein named; and after payment thereof, then as to the residue of said one-third in trust to pay the interest, &c., to her daughter the said minor Elizabeth, and after her decease to pay the principal to her issue, if any; and she thereby also appointed the minor Elizabeth residuary legatee, and the said Hall Chambers and Richard Babington executors. The report further found that the will of Elinor Chambers had not been proved in any Ecclesiastical Court of competent jurisdiction. The Master then found that it was insisted before him by Counsel on behalf of the said minor that the said Elinor did not in any manner by said deed of settlement of the 22nd of October 1823 extinguish, release, or deprive herself of the power given to her by the will of her father the said Isaac Todd over the one-third of the said sum of £8000,

and that he should therefore report the said Elizabeth entitled to the said third under the will of her mother, subject to the said two legacies; but the Master stated that he was of opinion, and accordingly found, that even if the said will had been proved it would be void and inoperative in regard to the said one-third of said sum of £8000, inasmuch as it appeared to him that according to the terms and true intent and meaning as well as the effect in a Court of Equity of the settlement of 22nd of October 1823, the said Elinor Chambers (who at the time of the execution thereof was of full age as aforesaid) had thereby released and deprived herself of all right to exercise the power of appointment given to her by her father's will in derogation of the trusts of the said settlement, and that inasmuch as by her said will the said Elinor exercised her power of appointment in favour of strangers to the settlement, and of only one of her children, to the exclusion of the other, the said will and the appointment thereby purported to be made was void and of no effect as regarded any portion of said sum of £8000; and he therefore found that the said sum of £8000 late currency, or the stocks or funds upon which the same was secured as in the report mentioned, should be divided equally to and amongst said two children, issue of the marriage of said John Chambers and Elinor his wife.

The Master then stated that inasmuch as the question raised before him was one of much importance to the parties concerned, and particularly to the said minor, he had considered it necessary to state the special facts in his report, in order to have the question brought before the Court so as to have the decision thereon without involving the parties in any further litigation or expense.

Mr. Chambers and Mr. Francis Fitzgerald, for the minor Elizabeth Chambers.

Mr. Michael Barry, for Mr. and Mrs. Kennedy.

The principal arguments are stated in the judgment. The following authorities were referred to: 1 *Sug. Powers*, pp. 41, 359;

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1847. *Green v. Green* (a); *Scrope v. Offley* (b); *Tempest v. Sabine* (c);
Rolls. *Attorney-General v. Vygor* (d); *Maundrel v. Maundrel* (e); *Reid*
In re *v. Shergold* (f); *Sadler v. Pratt* (g).
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The MASTER OF THE ROLLS now delivered judgment. After stating the facts as they appeared in the Master's report, his Honor said—

It has been contended on the part of the minor that the power given to her mother Elinor Chambers by the will of Isaac Todd over one-third of the £8000 was a power to dispose of same by her last will and testament; and that the deed of settlement executed on her marriage with the minor's father in 1823 did not release or extinguish that power; and the case of *Reid v. Shergold* (h) has been relied on as an authority to show that a power to be executed by will cannot be executed in any other manner. Lord Eldon in that case states:—"In this case the meaning of the testator was this:—He was providing anxiously in every part of his will, that his niece should have the power of receiving the rents and profits from time to time for her separate use; tying up her hands from indulging her inclination against herself. He studiously confines her power of giving the premises to a power of giving by will, in its nature revocable in any period of life; the power given in that way to protect her against her own act. This is the more strong, as the bequest of the £20 a-year, and the dividends of the £400 stock are expressly given for the niece for life; and after her death nothing was to take effect in her or any one but by her authority. She had nothing therefore in point of interest but for her life. In point of authority she might by her will have made a disposition to take effect after her death. It is then said if the sale is not good as a sale it shall be taken to be either something in the nature of a contract with reference to which a purchaser for

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| (a) 2 Jo. & Lat. 529; S. C. 8 Ir. Eq. Rep. 473. | (b) 4 Br. P. C. 237. |
| (c) 2 Sug. on Powers, App., p. 546. | (d) 8 Ves. 256. |
| (e) 10 Ves. 246. | (f) 10 Ves. 369. |
| (g) 5 Sim. 632. | (h) 10 Ves. 378. |

valuable consideration is to be aided; or an attempt and act done in or towards the execution, in respect of which this Court will aid him. I do not stay to determine whether it appears that she meant to execute the power, or conceiving, and I am clearly of opinion misconceiving, that she had the absolute interest to convey, she meant to convey that interest; and that this surrender should not be any thing done in execution of her power to dispose by will. The testator did not mean that she should so execute her power. He intended that she should give by will or not at all; and it is impossible to hold that the execution of an instrument or deed which, if it availed to any purpose, must avail to the destruction of that power the testator meant to remain capable of execution to the moment of her death, can be considered in equity an attempt in or towards the execution of the power. That therefore will not do." Other cases to the same effect have been referred to.

On the part of the minor therefore it has been argued by her Counsel that the will of her mother Elinor Chambers is valid, the right of the said Elinor to execute the power given to her by the will of Isaac Todd being, as they contend, in no way affected by the marriage settlement of 1823.

On the part of Mr. and Mrs. Kennedy (the latter being the sister of the minor) it is contended that the donee of a power may for valuable consideration covenant not to execute it, and that such covenant will be enforced; and *Scrope v. Offley* (a), *Tempest v. Sabine*, reported in the appendix to *Sugden on Powers*, and the case of *Green v. Green* (b) have been referred to.

In the latter case Sir Edward Sugden, p. 541, states, "There is no doubt upon the authorities that a man having a power may bind himself not to execute it, save subject to particular restrictions and conditions. He may release it altogether; or covenant to execute it in a particular manner, and the Court will give effect to such a covenant. Where the donee of the power restricts and limits himself in the execution of it, he must execute accordingly, or not at all."

(a) 4 B. P. C. 237. (b) 2 J. & L. 541; S. C. 8 Ir. Eq. Rep. 473.

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It has been attempted to distinguish that case from the present, on the ground that the power there might have been executed by deed or will. It appears to me, however, that the donee of a power, although the power can only be executed by will, may, by an instrument for valuable consideration, bind himself not to execute the power, or not to execute it unless under certain restrictions.

It has, however, then been contended by Mr. *Fitzgerald*, on the part of the minor, that even admitting that Elinor Chambers bound herself, by the terms of the marriage settlement, not to execute the power in favour of any person but the issue of the marriage, the will of the said Elinor would be valid as an appointment, so far as the minor was concerned. The will of Elinor purports to be executed in virtue of the power given her by the will of her father Isaac Todd, and of all other powers and authorities given her in that behalf; and the effect of the deed of settlement appears to me not to have extinguished the power given her by the will, but only to have precluded her from executing it in any manner inconsistent with the settlement.

The will, therefore, so far as it bequeaths any portion of the one-third of the £8000 to strangers, is void; but the appointment is not thereby avoided as to the minor, who was an object of the power in the will of Isaac Todd, and in the settlement.

That an appointment is not void as to the objects of the power, where a portion of the fund is appointed to strangers, is clear. In *Sadler v. Pratt* (a), a lady having four children by her first husband and three by her second husband, and having power to appoint a fund amongst the former only, appointed it amongst *all* her children equally; and declared that if her children by her first husband should refuse to share the fund with her other children, the whole fund should go to her youngest child by her first husband; and the Vice-Chancellor held that the appointment was not wholly void, but that the first class of children took each one-seventh of the fund under it, and the other shares went to them as in default of appointment.

(a) 5 Sim. 632.

The power in this settlement did not authorise an exclusive appointment to the minor, but there is nothing to prevent the donee of a power appointing a part of the fund to one of the objects of the power. The appointment however by Elinor Chambers to her grandchildren (the children of the minor) cannot, I apprehend, be sustained; and although there is a provision in the will of Elinor, that in case of the death of the said Eliza (the minor) without issue living at her death, the said Eliza should be at liberty to devise and bequeath the said sum in such manner as she might think proper, or dispose of same by deed with the consent of testator's trustees, I think the appointment was only valid so far as it gave a life interest to the minor in the one-third of the £8000, less by the two legacies of £150 each.

I am therefore of opinion, upon the special point raised by the report, that the minor is entitled to have transferred to the credit of this matter one-third of the £8000, less by the two legacies of £150 each; and that she is entitled to the interest and dividends of said sum for and during her natural life. I shall reserve the question as to who may be entitled to the principal of the said sum until after the death of the minor. I shall declare that the minor is also entitled to one moiety of the remaining two-thirds of the said sum of £8000, and to one moiety of the sum of £300, part of the one-third of the said sum of £8000 which the said Elinor bequeathed by the said will to Maud Hamerton and John Chambers; and I shall direct that the said several sums be transferred to the credit of this matter, and that the Accountant-General, out of the dividends to accrue on said sums, do draw in favour of Thomas Chambers, the guardian of the person of the minor, for the sum of £90 a-year, the maintenance in the report of the Master mentioned, said allowance to commence from the 26th day of December 1846.

The order cannot be drawn up until the will of Elinor Chambers shall have been proved.

The will of Elinor Chambers, the mother of the minor, having

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been proved, and the probate produced, an order was made from which the following is an abstract:—

His Honor doth declare that the will of Elinor Chambers deceased, mother of the said minor, dated the 1st of December 1846, was an ineffectual appointment of the one-third of the sum of £8000 in the said report mentioned, only as far as such appointment was inconsistent with the trusts of the settlement of the 22nd of October 1823 in the said report mentioned, and that therefore the respective appointments therein contained of the sums of £150 and £150 to Maud Hamerton and John Chambers were respectively ineffectual appointments: but that the appointment therein contained of the interest, dividends and annual proceeds of the residue of the said one-third to the said minor during her life, when the said will should be proved, was an effectual appointment thereof; and his Honor doth declare no opinion as to the appointment therein contained of the principal of the said residue after the decease of the said minor. And it is ordered that the said report be varied accordingly, and the minor be found entitled to the sum of £2500. 19s. 10d. Government £3½ per cent. stock, being one moiety of two-thirds of the sum of £7502. 19s. 6d. in said report mentioned, and thereby found to be the available proceeds of the said sum of £8000; and as to the remaining one-third of the said sum of £7502. 19s. 6d. Government £3½ per cent. stock, that is to say, the sum of £2500. 19s. 10d. of such stock, it appearing to his Honor by the certificate of Messrs. Bruce and Symes, public notaries, in writing, dated the 12th day of February 1848, that the value in such Government £3½ per cent. stock of £300, being the amount of the said sums of £150 and £150 so ineffectually appointed as aforesaid, was on the 12th day of July 1847, the day of the date of the said report, the sum of £321. 19s. of such stock; his Honor doth further order that the said minor be also found entitled to a moiety thereof—that is to say, the sum of £165. 19s. 6d. of such

last-mentioned sum of £2500. 19s. 10d. Government £3½ per cent. stock; and also to the dividends and annual proceeds during her life of the sum of £2169. 0s. 10d. of such stock, being the residue of the said last-mentioned sum of £2500. 19s. 10d. Government £3½ per cent. stock, after deducting the said sum of £331. 19s. of such stock.

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1848.
Jan. 28.
Feb. 3.
April 20, 26.

THE bill stated, that on the 8th of October 1844 the plaintiff filed his bill, and afterwards amended same; which bill so amended was against Walter Blake the younger and Jane Charlotte his wife, Andrew Blake, James Blake Butler, Martin Kirwan, William

A bill, filed in 1844, to raise a sum secured on a term created by a settlement of 1773, stated at

length the proceedings in a suit of A. v. B. by a prior judgment creditor, and prayed the benefit of the decrees and accounts therein, that the decrees might be carried into execution, so far as necessary for the plaintiff's relief, and a sale of the term. The cause stood over at the hearing to make two minors parties by supplemental bill. One of them, X., by his answer, impeached the decrees in the suit of A. v. B., and both claimed as purchasers for value under a settlement of 1842, made by W. At the hearing of the supplemental cause in June 1847, plaintiff's Counsel contended that X. could not impeach the decrees, as he claimed under W., who had acquiesced in them, and an order was made that the further hearing of the cause should stand over, with liberty to the plaintiff in the meantime to bring before the Court the parties beneficially interested in the decrees in A. v. B. The plaintiff filed a supplemental bill, setting out the whole of the proceedings in A. v. B., and the suit of 1844; certain assignments of the judgment and sum decreed in A. v. B. for the benefit of W., charging that W. and X., and the parties claiming under the assignment in A.'s right, could not object to have the decrees carried into execution, and praying that they might be carried into execution against them, and that the plaintiff might have the benefit thereof; or if the Court should be of opinion that they could not be carried into execution, according to the terms thereof, with such modification as to the Court should seem meet; and that plaintiff's claim, and all prior and contemporaneous charges, might be raised by a sale of the term of 1773. The Court refused to take the bill off the file as irregular; but—

Held, on demurrer, that the order of June 1847, though it authorised the filing of a supplemental bill to bring new parties before the Court, did not warrant the making of a new case; and that the case of estoppel, and the prayer that the decrees might be modified and altered, was a new case and not warranted by the order.

Seemle—The frame of the suit and relief prayed being altered, all the necessary parties to the suit of 1844 should be parties, particularly the party representing the term of 1773.

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Stewart and Abel Labertouche, Alexander Boyle and Rev. Alexander Nixon, the two last being executors of John Batchelor, deceased, and against several other parties as notice defendants; whereby he stated, among other things, "as your suppliant now charges the fact to be," that on the 1st of February 1815, John Batchelor filed a bill against Walter Blake the elder, Thomas Palmer, James Stewart, as surviving trustee of a deed of marriage settlement of the 25th of November 1773, Andrew Blake the elder and Isabella Blake his wife (who had been the widow of Xaverius Blake the elder), and several other parties. That John Batchelor, by the said bill stated, which the plaintiff charged to be the fact, that Xaverius Blake the elder being seised in fee of certain lands in the said bill mentioned, was indebted to Captain Walter Blake in the sum of £4000, and on the 1st of February 1772 gave a bond for the penal sum of £8000, with warrant of attorney to confess judgment to John Kirwan as a trustee for Captain Walter Blake; that judgment was entered on the bond on the 6th of November 1773 against Xaverius Blake the elder in the Court of King's Bench, and afterwards assigned to Captain Walter Blake, and again by him to John Batchelor in 1801; that in November 1773, Xaverius Blake the elder married Isabella Blake; and by a marriage settlement, dated the 25th of November 1773, conveyed certain lands to the use of himself for life, with remainder to his first and other sons in tail male, and divers remainders over, which were afterwards destroyed; that a trust term of five hundred years, to commence from the death of Xaverius Blake the elder, was vested in John Kirwan and James Stewart, to secure a jointure of £800 a-year to Isabella Blake, and £10,000 for younger children; and Xaverius Blake the elder was empowered to charge the lands with a further sum of £2000; that the settlement was registered; that there was issue of the said marriage seven children; and Xaverius Blake the elder died on the 16th of January 1784, leaving his widow, Walter Blake the elder his eldest son and heir, and six younger children, John, Xaverius Blake the second, Anne, Bridget, Arthur and Andrew, him surviving; that Xaverius Blake the elder made his will on the 20th of November 1773, and in execution

of the power given him by the settlement, appointed the sum of £10,000 equally among his six younger children in the event of their respectively attaining the age of twenty-one, with benefit of survivorship among them; that Isabella Blake, the widow of Xaverius Blake the elder, married Andrew Blake of Castlegrove; that on the 13th of February 1796, Captain Walter Blake filed a bill against the heir-at-law and Denis Blake the executor of Xaverius Blake the elder, and several other persons who were necessary parties to the suit, claiming £3167 as due to him on foot of the judgment, and prayed an account of the sum due, and of the personal estate of Xaverius Blake the elder, and that a competent part of his real estate might be sold to discharge the sum due. That John Batchelor, by his bill, after stating various dealings and transactions between him and Captain Walter Blake and William Bermingham, and divers proceedings in the said cause, and the discontinuance thereof, prayed that he might be entitled to the benefit of the judgment, and the proceedings on foot thereof, an account of what remained due on account of the personal estate of Xaverius the elder, and, in default of payment of the sum remaining due on the judgment, a sale of a competent part of the lands.

The bill then stated various proceedings in the cause of *Batchelor v. Blake*, and a decree pronounced on the 16th of July 1815, referring it to the Master to take an account of the sum due to John Batchelor for sums advanced as the consideration of the assignment of the said judgment to him, and an account of the real and personal estate of Xaverius Blake the elder, and of his debts, legacies and funeral expenses, and an account of all incumbrances; and that all creditors having charges and incumbrances affecting the estates should be at liberty to come in and prove the same. That Arthur Blake, one of the children of Xaverius Blake the elder, on the 25th of August 1810, assigned to Henry Butler all his right, title and interest in his several shares and proportions of the said sum of £10,000, being then entitled to £1666. 13s., one-sixth of £10,000, and to £416. 13s. 4d., one-fourth of the share of his brother Xaverius Blake the second, who died under twenty-one. That Henry Butler died in October 1814, and Hugh Molloy his administrator

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proved a charge in the cause of *Batchelor v. Blake*. That the Master made his report on the 11th of November 1818, and found the sum due to Batchelor; the lands of which Xaverius Blake the elder was seised at the rendition of the judgment, all of which were comprised in the marriage settlement of the 25th of November 1773, and in the term of five hundred years thereby created; the various parties entitled to the younger children's portions, and among others Henry Butler's right under the assignment of Arthur Blake's share. That exceptions were taken to the report, and the cause came on to be heard on report, exceptions and merits on the 7th of December 1818, when the Court overruled the exceptions, and declared John Batchelor entitled to the benefit of the proceedings in the said cause of *Blake v. Blake*, and that the sum reported was the first charge on the estates of Xaverius Blake the elder, and that a sale should be had for payment thereof and the other reported charges. That the cause was re-heard as between John Batchelor and William Bermingham, one of the defendants, on the 8th of July 1819, when the decree of the 7th of December 1718 was affirmed; that the last mentioned decree was enrolled by John Batchelor, but was never carried into execution. That Walter Blake the elder, who was the first tenant in tail of the lands under the settlement of the 25th of November 1773, attained age in 1796, and in Trinity Term 1796 suffered recoveries of the lands and thereby acquired an estate in fee subject to the term of five hundred years, and having previously married Mary Butler without having made any provision for her, a settlement bearing date the 21st of September 1799 was made, whereby, for the purpose of making a provision for the said Mary, and for the younger children of Walter Blake the elder, certain lands which formed a considerable portion of the lands comprised in the settlement of the 25th of November 1773 were conveyed to the use of Walter Blake the elder for life, remainder to trustees to preserve, &c., remainder, subject to a jointure to Mary Blake, to trustees for five hundred years, and subject thereto to the use of Xaverius Blake the third, the eldest son of Walter Blake the elder, for life, remainder to trustees to preserve, &c., remainder to the first and other sons of

Xaverius Blake the third in tail male, and divers remainders over in favour of Walter Denis Blake, James Blake and John Arthur Blake, the second, third and fourth sons of Walter Blake the elder : and that the plaintiff by the said bill stated that the trusts of the term of five hundred years were for the benefit of the younger children of Walter Blake the elder. That the plaintiff by his said bill further stated that Walter and Mary Blake had issue six children, viz., Xaverius the third, Denis James, John, Arthur the second, Henry, Teresa and Frances Louisa. That Mary Blake died in her husband's lifetime, and Xaverius Blake the third attained age, and afterwards in the year 1817 during his father's life married Ellis Maher, and had issue by her two children, Walter Blake the younger and Ellis Blake, the wife of Thomas M'Nevin. That the plaintiff by his said bill further stated, that after the decree of the 8th of July 1819, John Batchelor proceeded to have the lands brought to sale, but before any sale was had, Xaverius Blake the third, who was not a party to said cause, applied to stay the sale, and to restrain the proceedings until he and his infant son Walter Blake the younger should be made defendants ; that the sale was stayed, with liberty to John Batchelor to file a supplemental bill, as he might be advised, to bring new parties before the Court. That on the 22nd of November 1824, John Batchelor filed an original bill in the nature of a supplemental bill against Xaverius Blake the third, and his son Walter Blake the younger, Richard Darcy, and several other persons who claimed estates in the lands affected by the decree of the 8th of July 1819, and thereby prayed that the said decree might be carried into execution, and that such of the defendants as might be deemed necessary for the purpose might be directed to join in the conveyance to the purchaser of such of the lands as might be sold under the decree. The bill then stated divers proceedings in this last-mentioned cause, and a decree of the 9th of December 1826, whereby it was ordered that the decree of the 8th of July 1819, or so much thereof as should be necessary for the purposes of the decree, should be carried into execution, and that all proper persons should join in the conveyance to the purchaser of such of the lands as should be sold ;

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and that the lands not comprised in a certain deed of conveyance mentioned in the answer of Richard Darcy should be sold in the first instance; and that if the produce of said sale should not be sufficient for the purposes of the decree, that the lands comprised in the last mentioned deed, or so much as should be necessary, should be sold.

The bill further stated that the said bill further charged "as plaintiff now charges," that the last mentioned decree was varied by another decree of the 15th of February 1827 on a re-hearing, at the instance of Xaverius Blake the third and his then infant son Walter Blake the younger, whereby it was ordered that the demand of John Batchelor should be reduced from £5718. 19s. 3d. to £5204. 19s. 8d. That the plaintiff by his said bill further charged that, on the 24th day of May 1827, Xaverius Blake the third filed a bill on behalf of himself and his infant son against John Batchelor, and impeached the said several decrees and proceedings for fraud, and prayed among other things that the decrees of the 8th of July 1819, the 9th of December 1826, and the 15th of February 1827, so far as any sum was thereby decreed due on foot of the said judgment, or of costs, to John Batchelor, and made a charge on the lands, might be set aside for fraud, or should stand as a security only for such sums as should happen, upon taking of the account, to be found due; and that certain accounts might be taken in order to ascertain the sum fairly due on foot of the judgment. That John Batchelor died after service of subpoena on him, on the 26th of March 1828, without having answered, and the said cause was revived against Alexander Boyle and the Rev. Alexander Nixon as his executors, and was heard on the 13th of June 1830, when the bill was dismissed with costs. That on the 2nd of May 1828, A. Boyle and A. Nixon filed a bill of revivor in John Batchelor's suit, but did not prosecute the same, because in 1809 a receiver had been appointed at the instance of Lord Clanmorris and other judgment creditors of Walter Blake the elder, over the lands comprised in the deed of the 25th of November 1773, and before the decree of the 8th of July 1819 the receiver was extended to a cause instituted by Andrew Blake, the brother of Walter Blake the elder, to enforce the payment of his charge of

£1666. 13s. 4d., and to certain other causes instituted by persons who claimed charges on the lands; and on the 22nd of November 1821 the said receiver was at the instance of John Batchelor removed, and another receiver (George Hughes) appointed at the instance of John Batchelor; that Hughes was removed in 1826, for having applied £4000 for his own and John Batchelor's use, and Richard Prendergast appointed receiver in his place; and John Batchelor was one of Hughes's sureties, and did not insist on Prendergast receiving all the rents of the lands, but connived at Walter Blake the elder continuing in possession; that after the death of Walter Blake the elder in 1836, Xaverius Blake the third entered into the receipt of the rents which Walter Blake the elder had been permitted to receive; that upon Walter Blake the younger attaining age, he also entered into receipt of the rents of the last mentioned lands; for the persons at whose instance the receiver was originally appointed ceased to have any interest in the lands upon the death of Walter Blake the elder, and an arrangement was made whereby Andrew Blake and those entitled in his right agreed to take the interest of the charge, and A. Boyle and A. Nixon had been paid or secured the full amount of the sum which they agreed to accept by way of compromise of their demand. That the said suit of *Batchelor v. Blake* became abated again by the death of Walter Blake the elder, Xaverius Blake the third, and Hugh Molloy and others, and was never revived, and was even before the abatements so defective that no sale could have been had in it; that by an order in the revived cause of *Batchelor v. Blake*, of the 14th of June 1844, on the application of Walter Blake the younger the receiver was discharged with the consent of A. Boyle and A. Nixon and Andrew Blake the younger; "but as plaintiff by his said bill charged and now charges," there was not at the time of the said order, nor had there been for several years before, any personal representative of Henry Butler in existence; for Hugh Molloy had died, and no other person was appointed administrator until the plaintiff was appointed on the 27th of July 1844, and all the persons interested in the suit of *Batchelor v. Blake* compromised their rights with Walter Blake the younger; that the plaintiff, as personal represen-

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tative of one of them (Henry Butler), was obliged to file a bill to raise his charge, to have the former decrees carried into effect, and to bring the proper parties before the Court.

The bill then stated that plaintiff by his said bill charged that Xaverius Blake the third, upon the death of Walter Blake the elder, became under the limitations of the settlement of the 20th of September 1799 entitled to an estate for life in the lands; that he had two children, Walter Blake the younger and Ellis M'Nevin; that he died in 1838, and thereupon, the bill charged, Walter Blake the younger became tenant in tail, and having attained age in February 1841, barred the estate tail in 1842, and acquired a fee in the lands.

The bill then stated that the plaintiff by his said bill charged that in June 1842 a settlement was executed on the marriage of Walter Blake the younger, but the plaintiff knew not whether any legal estate vested in the trustees of the said settlement, or whether Walter Blake the younger was thereby made tenant in tail.

The bill then stated that the said bill traced the title of the term of five hundred years, created by the settlement of 1773, to W. Stewart, and that of the deed of 1799, and the legal estate under it to several defendants, and charged that the plaintiff as the legal personal representative of Henry Butler was entitled to the sum reported due to Hugh Molloy in the cause of *Batchelor v. Blake*, and had applied to A. Boyle and A. Nixon to carry into execution the decrees of 1819, 1826 and 1827; but that they alleged they had assigned their interest. That the plaintiff by his said bill prayed, among other things, the full benefit of the suit of *Batchelor v. Blake* and the decrees and accounts therein; that the decrees of 1819, 1826 and 1827 might be carried into execution so far as might be necessary for the relief of the plaintiff; an account of the sums due on foot of the several charges, and that the plaintiff might be paid the sum due to him as the personal representative of Henry Butler; and a sale of the five hundred years term created by the settlement of 1773; "as by said bill remaining as of record in the proper office in this Honorable Court may appear."

The bill then stated that Walter Blake the younger and his wife

answered the bill, whereby they set up the Statute of Limitations, but made no other defence. That by a further answer they admitted the several proceedings, and that the decrees remained unexecuted, inasmuch as by a compromise entered into by the parties claiming under the settlement executed upon the marriage of the defendants, the rights of the plaintiffs in the cause had been purchased up for the benefit of the parties claiming under the said settlement. That the executors of John Batchelor had abandoned the cause and did not intend to have the proceedings carried into execution; that they had been paid by Walter Blake the younger £3000 on foot of John Batchelor's demand, and did not claim any thing; and Walter Blake admitted that a compact was entered into between Boyle and Nixon and several other of the parties who were entitled to the benefit of the said decree, with the defendant Walter Blake the younger and the trustees of the said settlement.

The bill then stated that Boyle and Nixon, by their answer, also admitted the proceedings in the cause of *Batchelor v. Blake*, and that they had agreed to discontinue them at the request and by the desire of the legatees of John Batchelor; that they did not intend to carry the decrees into execution, having received £5000 in full discharge of their demands; and that by deed of the 15th of February 1843, they, and certain persons who were legatees and next-of-kin of John Batchelor, assigned the sum decreed to be paid to the said John Batchelor by the said decrees, and the interest accrued since the confirmation of the report in the cause, to Felix M'Donnell, as a trustee for Walter Blake, and also assigned the judgment.

The bill then stated certain proceedings in the cause, and a hearing on the 16th of February 1847, when the cause was directed to stand over, in order to make two minor children of Walter Blake the younger, Xaverius Blake the fourth, who claimed an estate tail in the lands, and Florinda Blake, parties. That a supplemental bill was filed on the 6th of March 1847, making them parties, and praying the same relief against them as by the original bill was prayed against the parties thereto. That Xaverius Blake the fourth, by his answer, alleged that the decrees were erroneous and not

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binding on him, but did not assign any specific error, and that he was a purchaser for valuable consideration of the estate. That Florinda Blake claimed by her answer a sum of £5000 under the settlement of the 11th of June 1842.

The bill then stated further proceedings in the cause, and that it came on to be heard on the 28th of June 1847. That upon the hearing, Counsel on the part of Xaverius Blake the fourth alleged and insisted that the plaintiff was not entitled to have the said several decrees or any of them carried into execution, because the same were erroneous, as they directed that the inheritance of the lands comprised in the settlement of the 25th of November 1773 should be sold for the purpose of creating a fund for the payment not only of the sum due on foot of the judgment obtained by Kirwan against Xaverius Blake the elder, but also for the payment of several sums due on foot of the charge of £10,000 which was charged on the term of five hundred years created for that purpose; that it was submitted on the part of the plaintiff, that even supposing the decrees to be erroneous so far as they directed a sale of the inheritance for the sums due on foot of the charge £10,000, the Court might direct the decrees to be carried into execution by directing a sale of the lands for the residue of the term. That it was not competent for Walter Blake the younger or Xaverius Blake the younger, who had no other title to the lands save as derived from Walter Blake the younger, and by virtue of the settlement of 1842, executed by the said Walter Blake when he was seised of the inheritance, and had acquiesced in the said several decrees, and acknowledged and confirmed the rights to which the said decrees were intended to give effect, to impeach the said decrees, because the said Walter Blake was bound by the decrees of the 9th of December 1826 and 15th of February 1827, and inasmuch as the said Walter Blake did after he attained his age of twenty-one years distinctly recognise the validity of the said decrees.

The bill further stated that inasmuch as several persons beneficially entitled to the sum remaining due on foot of John Batchelor's demand were only notice parties, the Court declined to pronounce a decree which might affect them, and ordered "that

the further hearing of the cause should stand over, with liberty to plaintiff in the meantime to bring before the Court the parties beneficially interested in the said decrees."

The bill then stated that the only persons beneficially interested, who were not before the Court at the time of the hearing, were Felix M'Donnell, Alexander Clendenning Lambert, George Clendenning and Alexander Clendenning; that A. C. Lambert had advanced £3000 to Walter Blake the younger to effect the arrangement with the executor of John Batchelor; that it was agreed that Boyle and Nixon should in the first instance assign the decrees and judgment to Felix M'Donnell as a trustee for Walter Blake, and that Felix M'Donnell should then assign the same to A. C. Lambert, G. Clendenning, and A. Clendenning to secure the repayment of the said sum of £3000; that on the 15th of February 1843, Boyle and Nixon accordingly, in consideration of £3000, assigned to Felix M'Donnell the sum directed to be paid by the decree, and all the interest accrued thereon since the confirmation of the report in November 1818, and all costs, and the benefit and advantages of the decrees; and on the same day the judgment was assigned to Felix M'Donnell, but the assignment was not enrolled until the 13th of January 1847; that on the 24th of November 1843, Felix M'Donnell assigned the same securities to A. Clendenning, subject to redemption on payment of £3320. 15s. 9d., with interest; that the £3320. 15s. 9d. was the money of A. Clendenning, G. Clendenning and A. C. Lambert, and the assignment was in trust for them, and that they and Walter Blake the younger, Xaverius Blake the fourth and F. M'Donnell, insisted that the said judgment was still a good, valid and subsisting security, and that there remained due on foot thereof and of the decrees the sum of £4804. 12s. 0d., with interest and costs. That Walter Blake the younger, who, by means of the said dealings with the executors of John Batchelor, continued to stay all further proceedings in Batchelor's cause, on the 29th of June 1844, obtained an order discharging the receiver, and entered into receipt of the rents of the lands comprised in the settlement of the 23rd of September 1799. That by the settlement of the 11th of June 1842, Walter Blake conveyed to Sir John Taylor

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and James O'Hara and their heirs all the lands comprised in the settlement of the 23rd of September 1799, by which a jointure of £400 a-year in case of issue, and £500 in case of no issue, was secured to Frances Livesay after the death of Walter Blake, in case she should survive him, and certain sums were provided for the younger children of the marriage, and a trust term was vested in James Hardiman Burke and George Bingham to secure the jointure, and another term of five hundred years in Richard Livesay and Stewart Maxwell, to raise the younger children's portions, and Walter Blake was empowered to raise any sum not exceeding £25,000, and with the consent of Edward Livesay during his life to compromise the debts, charges and incumbrances theretofore created and then outstanding, and claimed to be due as affecting said estates; that the deed was not registered until August 1846.

The bill then stated that it appeared on search made in the registry that, on the 27th of April 1846, in consideration of £1000 paid by Martin Cathcart to Edward Livesay by the desire of Walter Blake the younger, he Walter Blake mortgaged the lands comprised in the deed of September 1799 to Martin Cathcart, and a further mortgage to Cathcart, dated the 26th of June 1846, for £1500.

The bill then charged that the said Walter Blake the younger, Xaverius Blake the fourth, F. M'Donnell, A. Clendenning, G. Clendenning and A. C. Lambert, and the persons claiming in right of John Batchelor or his executors, were precluded from objecting to the plaintiff's right to have the said several decrees carried into execution in such manner as the Court should direct. The bill further stated that Isabella Blake, the widow of Xaverius Blake the elder, in March 1828, filed a bill against John Batchelor and others for her jointure secured on the term of five hundred years created by the settlement of November 1773, praying an execution of the trusts of the said deed, an account of prior incumbrances and a sale; that John Batchelor died before service of subpoena, and that the bill was amended by making Boyle and Nixon his executors, who in May 1828 filed a bill of revivor in the suit of *Batchelor v. Blake*. That in June 1828, Isabella Blake demurred to the bill of

revivor, and that an application by Boyle and Nixon to set aside the demurrer was refused, and the demurrer was heard and allowed, with liberty to amend.

The bill then stated an order of the 23rd of December 1828, founded on a consent in the causes of *Batchelor v. Blake, Nixon v. Blake* and *Isabella Blake v. Boyle*, whereby it was referred to the Master to take an account of the sum due to Isabella Blake for her jointure, and that the Accountant-General should transfer out of the funds to the credit of the cause the sum found due, and that the receiver in the cause of *Batchelor v. Blake* should continue to pay her the jointure from time to time; that the decrees of July 1816, June 1818, December 1818 and July 1819, in the cause of *Batchelor v. Blake* should be revived, and Isabella Blake should be bound thereby, and by the decree of February 1827; that the decrees of December 1818 and July 1819 should be amended by directing the arrears of Isabella Blake's jointure to be paid; that the sales decreed should be made subject to the jointure, and Isabella Blake's bill should be dismissed, and her costs paid out of the funds in the receiver's hands; and by the said order it was referred to the Master to enquire whether all the parties in the causes had signed the consent, and if not, who were the parties who had not signed it, and what were their interests, and whether it was for the benefit of Walter Blake the younger, the minor, that the said consent should be made a rule of Court?

The bill then stated, that in February 1829 the Master made his report, finding the jointure the first charge except Batchelor's judgment, the sum due on foot of the jointure; that certain parties claiming subsequently under the said deed of 1799 were not parties to the consent, which was for the benefit of the minor; that the consent was made a rule of Court on the 20th of February 1829 in the terms above stated, which were repeated at length in the bill.

The bill then stated that the decrees of December 1818 and July 1819 were amended pursuant to the order; that Andrew Blake, one of the younger children of Xaverius Blake the elder, applied on the 18th of February 1828, in the cause of *Batchelor v. Blake*, and in his own cause, that the Master might be directed to open his

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report of the 11th of November 1818, and to amend that part of it which referred to the sum due to the said Andrew Blake in his own right and that of his brothers Arthur and Xaverius the third, and the assignees of the charges, by adding the arrears of interest fairly due thereon, whether prior or subsequent to the said report; and an order was made to open and correct the report, and amend such parts of it as referred to the sum due to Andrew Blake in his own right and that of his said brothers, by adding thereto such sums as should appear justly due for interest; and a renewal of this order bearing date the 18th of March 1830.

The bill then stated a further application of Andrew Blake in *Batchelor v. Blake* on the 12th of June 1833, for a reference to enquire the sum due on foot of his share of the £10,000 provided for the younger children of Xaverius Blake the first, and his part of the share of Xaverius Blake the second, and for an amendment of the decree of July 1818, by inserting the sum which should be found due in lieu of the sum therein declared to be due to Walter Butler and James Mahon the trustees of Andrew Blake, and an order made thereon in the terms of the application; the report of the Master finding the sums of £4666. 0s. 10d. and £1449. 14s. 2d. due to W. Butler as personal representative of the surviving trustee of Andrew Blake's share; a deed of the 10th of June 1842, whereby W. Blake the younger charged the lands comprised in the deed of September 1799 with a sum of £3616, the amount of the arrears of interest due on the principal sums to which Andrew Blake was entitled, and by which deed the bill charged Walter Blake fully recognised and confirmed the proceedings on the part of Andrew Blake for the purpose of having the said decree of July 1819 amended as directed by the order of the 12th of June 1833; an application by Robert Power assignee of the said Andrew Blake for payment of the interest, which was granted on the assent of Walter Blake; and various proceedings on behalf of parties who were entitled to a share of the £10,000 in right of Anne Blake, one of the younger children of Xaverius; and an order made in May 1844, for payment of £311. 0s. 3d. interest on said share, which the bill

charged was a payment on foot of the £10,000, to take the plaintiff's claim out of the Statute of Limitations.

The bill then stated an application by Walter Blake the younger for payment of a sum of money, in which he by his affidavit relied on the several decrees, and submitted that the plaintiff was entitled to have the said decree carried into execution against Walter Blake the younger and his wife, and against the trustees of the marriage settlement of 10th of June 1842, and against Martin Cathcart, Felix M'Donnell, G. Clendenning and A. C. Lambert, and prayed that he might be decreed entitled against the several defendants to the full benefit of the suit of *Batchelor v. Blake* and the decrees therein; or if the Court should be of opinion that the decrees might not be carried into execution according to the terms thereof, then that it might be carried into execution for the plaintiff's benefit in such manner and with such modifications as to the Court should seem meet; an account of the sum due to Molloy as administrator of Henry Butler by the report of the 11th of November 1818, and on foot of prior and contemporaneous incumbrances; and all other necessary accounts on foot of the other shares of the £10,000 under the deed of the 25th of November 1773; payment of the sum due to the plaintiff as personal representative of Henry Butler, or in default, that it and all prior and contemporaneous incumbrances might be raised by a sale of a sufficient part of the lands comprised in the term for five hundred years.

Mr. *Christian*, with whom was Mr. *F. W. Walsh*, for the defendant Walter Blake and Frances his wife, moved that the bill might be taken off the file of the Court as a novelty and irregularity, the same having been filed contrary to the practice of the Court.

Mr. Serjeant *Warren* and Mr. *O'Brien*, for the plaintiff, opposed the motion.

The grounds relied on in support of the motion were—first, that the bill was not in conformity with the Lord Chancellor's order of the 30th of June 1847; secondly, that it was for two inconsistent purposes, viz., to review a decree enrolled, or to alter the terms of it,

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and also to carry it into execution on the ground of acquiescence; thirdly, that as a bill of review it was founded on new matter, and had been filed without the leave of the Court; fourthly, that as a supplemental bill it was improperly filed without the leave of the Court, and sought to introduce on the record by supplemental bill new matter which was properly the subject of amendment; fifthly, that it was framed in violation of the 57th General Rule, which forbade the introduction of the statements of the original bill into a supplemental bill.

The following cases were cited; *Colclough v. Evans* (a); *Milligan v. Mitchell* (b); *Blackburn v. Staniland* (c); *Hodson v. Ball* (d); *The Attorney-General v. Cooper* (e); *Richards v. Page* (f); *Perry v. Phelps* (g); *Davis v. Bluck* (h); *Toulmin v. Copland* (i).

The MASTER OF THE ROLLS made no rule on the motion, without prejudice to the defendant's raising the objections at the final hearing of the cause; the costs of the motion to abide the event of the costs in the cause.

On the 11th of December 1847 the defendant James Hardiman Burke demurred to the bill, stating as cause want of equity; that the bill, contrary to the law of the Court, not only sought to have the benefit of the former decrees of the 8th of July 1819, the 9th of December 1826, and the 15th of July 1827, but also, in case the Court should be of opinion that the said decrees ought not to be carried into execution according to the terms thereof, then that the same may be carried into execution for the benefit of the plaintiff in such manner and with such modification as to the Court should seem meet. That by the rules and practice of this Court no bill of

(a) 4 Sim. 76.

(c) 15 Sim. 64.

(e) 3 M. & Cr. 258.

(g) 17 Ves. 173.

(b) 1 M. & Cr. 433.

(d) 1 Phil. 177.

(f) 2 Ir. Eq. Rep. 223.

(h) 6 Beav. 393.

(i) 4 Hare, 41.

revivor, or supplemental bill, or new bill in the nature of a bill of revivor grounded upon any new matter discovered, or pretended to be discovered since the pronouncing of any decree of this Court, in order to the reversing or varying of such decree, should be exhibited without the special leave of the Court, which it did not appear was obtained. That the bill stated a case, and prayed relief different from and inconsistent with the case stated, and relief prayed by the bill filed by the plaintiff on the 8th of October 1844, and was not warranted by the Lord Chancellor's order of the 30th of June 1847. That the bill introduced new matter which was properly matter of amendment and not of supplement. That the bill was one which in its frame was unknown in practice and contrary to the rules of the Court, and that on the plaintiff's own showing in the said bill all the persons who were parties defendant in the bill filed on the 8th of October 1844 should be parties to the said bill.

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Mr. *F. W. Walsh* and Mr. *Christian*, in support of the demurrer.

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April 20.

Mr. *Maley* and Mr. Serjeant *Warren*, contra.

In addition to the cases cited on the motion to take the bill off the file, the following authorities were referred to:—

Mitf. pp. 206, 115, 5th ed.; *Story's Eq. Pl.* p. 408, s. 384; *Johnston v. Northey* (a); *O'Connell v. M'Namara* (b); *Watts v. Hyde* (c); *Milner v. Lord Harewood* (d); *Greenwood v. Atkinson* (e); *Wood v. Wood* (f); *West v. Skip* (g); *Lord Lucan v. Latouche* (h); *Crompton v. Wombwell* (i); *Kelly v. Lennon* (k); *Blackburne v. Staniland* (l); *Smith v. Effingham* (m); *Semple v. Price* (n); *Dyson*

(a) 2 Vern. 407; S. C. Pr. in Ch. 134.

(b) 3 Dr. & War. 411.

(c) 2 Phil. 406.

(d) 17 Ves. 144.

(e) 5 Sim. 419.

(f) 4 Y. & Col. Ex. 135.

(g) 1 Ves. sen. 239, 455.

(h) 1 Law Rec. N. S. 169.

(i) 4 Sim. 628.

(k) 1 Jo. & Lat. 305; S. C. 7 Ir. Eq. Rep. 98.

(l) 15 Sim. 64.

(m) 11 Jur. 896.

(n) 10 Sim. 238.

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v. *Morris* (a); *Jones v. Stowells* (b); *Howells v. Baker* (c); *Parker v. Carter* (d).

THE MASTER OF THE ROLLS.

A demurrer has been put in to the bill in this cause by James Hardiman Burke, one of the trustees of the term of ninety-nine years created by the deed of 1842; and the first question which arises is, whether the order of the Lord Chancellor, at the hearing in June 1847, authorised the filing of the present bill?

In consequence of a motion which was made before me in this cause, I happen to be aware of the fact, that the Lord Chancellor's order is not set out in terms in the bill, and I suggested at the commencement of the argument that it would be desirable that the bill should be amended by setting out the order (which is very short) *in hæc verba*. The plaintiff's Counsel, however, declined to amend, and I must therefore decide the questions which arise upon the terms of the order as set out on the record. That order is set out in these words in the bill:—"That the said cause should stand over, with liberty to the plaintiff in the meantime to bring before the Court the parties beneficially interested in the said several decrees."

It has been decided in *Greenwood v. Atkinson* (e), and in *Wood v. Wood* (f), that where liberty is given at the hearing to *amend* by adding parties, the plaintiff may bring the parties before the Court by a supplemental bill. In the present case the order does not specify that it is by *amendment* the parties are to be brought before the Court; and even if it had so stated, the authorities I have referred to show that the plaintiff was justified in filing a supplemental bill to bring the new parties before the Court. I am however of opinion that the order of the Lord Chancellor did not authorise the plaintiff to file a bill raising a different case from that made by the bill of 1844.

(a) 1 Hare, 420.

(c) 3 Hare, 73.

(e) 5 Sim. 419.

(b) 2 Hare, 42.

(d) 4 Hare, 406.

(f) 4 Y. & Col. Ex. 135.

By the bill of 1844, and the supplemental bill filed against Xaverius the fourth and Florinda Blake, it is sought to carry the decrees in Batchelor's suit into execution. The present bill brings before the Court not only the new parties, but also Walter Blake and his wife and son and daughter, who were before the Court at the hearing when the order of June last was made by the Lord Chancellor; and it is sought by the present bill to make a new case, viz., that Walter Blake the younger and all deriving under him are precluded and estopped by the facts stated in the bill from raising any objection to the decrees in Batchelor's suit which are sought to be carried into execution; or secondly, that if the Court should consider the decrees erroneous, and that therefore they cannot be carried into execution, that in such case they should be rectified and carried into execution, with the modifications and alterations stated in the present bill and the prayer thereof.

Counsel on the part of the plaintiff contended that the present bill made no new case, and that it sufficiently appeared on the face of this bill that the bill of 1844 had put in issue the several matters relied on in the present bill as precluding and estopping Walter Blake the younger and all deriving under him from raising any objection to the decrees in Batchelor's suit; and the ground upon which the plaintiff's Counsel so contend is, that it is stated in the present bill that the plaintiff's Counsel submitted amongst other matters to the Lord Chancellor at the hearing in June 1847, that it was not competent for Walter Blake the younger, or his son Xaverius the fourth who derived under him, to impeach the decrees in Batchelor's suit as being erroneous, inasmuch as Walter Blake the younger acquiesced in the said decrees, and did, after he attained twenty-one, distinctly recognise the validity of the said decrees in the manner which is afterwards particularly set forth in the present bill; and it is contended by plaintiff's Counsel that as such argument would not have been properly open to him if these matters had not been put in issue by the bill of 1844, the Court must infer they were so put in issue, and that such case was made by the bill of 1844.

I do not concur in that argument; the present bill purports to

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set forth specifically the case made by the bill of 1844; it commences by stating that the plaintiff by his said bill so filed on the 8th of October 1844, "stated amongst other things, as your suppliant now charges the fact to be," and then proceeds to state with great prolixity the contents of the bill of 1844, and the prayer of said bill; and after said prayer of the bill of 1844, adds, "as by the said bill remaining as of record in the proper office of this Honorable Court may appear."

Not a word is to be found in this statement to show that the bill of 1844 sought to make the case of estoppel, or the case that the decrees in Batchelor's suit might be modified and altered, and carried into execution with such alterations; and I cannot concur in the argument that, because in a subsequent part of the present bill, in stating what occurred at the hearing of the suit of 1844 Counsel argued that Walter Blake the younger, and those deriving under him, did recognise the validity of the decrees in the manner in the present bill afterwards set forth, that it is therefore to be assumed that the argument could not have been used unless these several matters, which are afterwards set forth with great prolixity, were put in issue by the bill of 1844.

In the case of *Columbine v. Chichester* (a) Lord Cottenham lays down, "That the presumption is always against the pleader, because the plaintiff is presumed to state his case in the most favourable way for himself, and therefore if he has left any thing material to his case in doubt it is assumed to be in favour of the other party."

I am very clearly of opinion, judging from the statements in the present bill, that there is no foundation for the suggestion that the plaintiff sought by his bill of 1844 to bind Walter Blake the younger and those deriving under him, on the ground that they were precluded and estopped from relying on any error in the decrees in Batchelor's suit, or that the decrees, if erroneous, might be carried into execution with the alterations and modifications now suggested. But if there was any doubt upon the fact, the rule of pleading laid down by Lord Cottenham, and also laid down in many other

(a) 2 Phil. 28.

cases, establishes that I am to infer that the case now made by this bill was not made by the bill of 1844. The reason why the case was not made by the bill of 1844 was obviously this, that it was not until the answer of Xaverius the fourth, filed in 1847, that the point was for the first time raised, that the decrees in Batchelor's suit were erroneous.

It being therefore perfectly clear in my opinion that the present bill makes an entirely new case in the two particulars I have mentioned, I shall consider whether the order of the Lord Chancellor would have justified such an alteration in the frame of the suit by amendment.

In the case of *Gibson v. Ingo* (a) an objection was taken at the hearing that a person of the name of Joseph Hopper was a necessary party to the suit, and had not been made a defendant; an order was accordingly made at the hearing that the cause should stand over with liberty to the plaintiff to amend the bill by adding proper parties, with apt words to charge them, or to show that the said Joseph Hopper was not a necessary party to the suit, or with liberty to file a supplemental bill. Under that order the plaintiff amended his bill by making Hopper a defendant, and he introduced by amendment a charge in the bill against the original defendants, which was not necessary, in order to make a case against Hopper. A motion having been made to take the amended bill off the file, Wigram, V. C., in giving judgment, said:—"The question at the hearing of a cause upon an objection for want of parties is, whether the Court, as against the defendants who are before the Court, can give the relief which the plaintiff asks in the absence of those who are suggested to be necessary parties? and when liberty is given at that stage of the cause to amend the bill by adding parties, the purpose of the order is to enable the plaintiff to bring the cause to a hearing without any variation of the case against the original defendants to try the same case in the presence of the necessary parties. Under such an order as was made in this case the plaintiff may amend the bill either by showing why the person whose absence

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(a) 5 Hare, 156.

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is objected to is not a necessary party, or if he be made a party, by inserting such charges (if any) as may be necessary to show him why he is so made a party. In this case the plaintiff has made Hopper a party, and has then gone on to charge that the original defendants are liable to the plaintiff for whatever the plaintiff may be liable to Hopper. Such a charge may be necessary to enable the plaintiff to recover against the old defendants, but not to make their case against Hopper. It is said that this is the result of the facts stated; that it is only a conclusion of law, and that it is a relief to which the plaintiff is entitled under the prayer for general relief. Whether the prayer for general relief would or would not, in the circumstances of the case, comprehend the relief adverted to in this case without the bill containing the charge, is a question which I cannot try without hearing the cause; and the Court is not now to hear the cause for the purpose of ascertaining such a point. The charge, I may observe, must be either immaterial or improper; for if the charge has no effect, which the general prayer would not have made, there is no necessity for introducing it; and if it has any new effect not embraced in the case originally made, the defendants ought not to be subjected to it. The charge may possibly point out an alternative case which may require a new defence and a new answer." An order was accordingly made, expunging the charge which affected the original defendants.

In the case of *Milligan v. Mitchell* (a) an order was made at the hearing that the cause should stand over with liberty to the plaintiff to amend his bill by adding parties as he should be advised, or showing why he was unable to bring all proper parties before the Court. The plaintiff amended the bill by adding co-plaintiffs, and introduced new statements and charges in the bill relating to such co-plaintiffs. Lord Cottenham directed that the amended bill should be taken off the file and all subsequent proceedings set aside. The objection in that case was taken by the answer to the amended bill, and the defendant relied on the irregularity as if he had pleaded, and it was held that the objection might be urged at the hearing of the cause.

(a) 1 M. & C. 433.

In the case of *Powell v. Cockerell* (a) Vice-Chancellor Wigram states, "Where the Court at the hearing allows the bill to be amended by adding parties, the order does not enable the plaintiff to alter the case which is before the Court at the time the order is made; it only enables the plaintiff to bring before the Court a new party whose presence is necessary to the decision upon that same case. If the plaintiff (amending his bill) confines himself within the scope of the order, the cause as regards the old defendants will come on again for hearing on precisely the same case as before."

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In the recent case of *Watts v. Hyde* (b) Lord Cottenham decided, reversing an order of Vice-Chancellor Bruce, that at the hearing of the cause liberty ought not to be given to the plaintiff to amend his bill so as to raise a different case from that on which he had previously relied.

Lord Cottenham, in giving judgment, said:—"The evils which must necessarily attend making a new case after the cause has been brought on for hearing are so obvious that it cannot be necessary to enumerate them; and I have frequently of late taken occasion to express my opinion of any relaxation of the practice in that respect. The rules which regulate pleading and the conduct of a cause, and particularly the taking of evidence, are framed for the purpose, as far as possible, of enabling both parties to bring their case fairly and fully before the Court; and to guard against those dangers, particularly with respect to evidence, which the mode of proceeding in Equity is too much calculated to produce. These objects would be defeated, and these guards become inoperative, if a new case were permitted to be made at the hearing; and such an order as this has the additional objection, that it holds out a kind of promise to the plaintiff that if he can make out such a case as the order suggests, the Court will grant him relief. It is true, that the order prohibits the plaintiff from going into any evidence without leave of the Court; but if he has already, and before any such case was made, given evidence upon which he can rely to support it when made, such evidence must have been given improperly, there being no

(a) 4 Hare, 569.

(b) 2 Phil. 406.

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matter in issue to which it could apply; and the defendant, who for that reason was not bound, and could not be expected to answer it, is now with full knowledge of his adversary's evidence to do what he can to contradict it; a course contrary to all the rules of Courts of Equity, whatever may be the merits or demerits of such rules. It is not, however, from any opinion of my own, as to the evils likely to arise from the permission given by the order appealed from, that I feel it impossible to sanction it. It is a question of practice and a case of discretion; and I have made these observations only for the purpose of showing the grounds upon which I decline to relax the practice upon this subject, by which I mean the existing practice; for I am aware that there are instances, particularly in former times, of great latitude having been allowed as to amending bills, and it is and must be a matter of discretion; but that discretion ought to be regulated by what has been found most secure for and beneficial to the suitor. I therefore, for this purpose, look to the case of *Palk v. Clinton* (a), in which the question was much considered by Sir W. Grant. I have no disposition to go beyond that case, or to depart from the rule as there laid down. The case made by the bill was, as to the existing defendants, complete, and required no alteration, and if the bill had prayed only general relief, what the Court thought the plaintiff entitled to might have been decreed; but the bill prayed specific relief, to which the Court thought him not entitled, and the praying of which prevented the Court from assisting him under the general relief. The Court therefore permitted him to amend, by praying the relief to which the Court thought him entitled. There was no new case made—no new matter put in issue—no new evidence, and therefore none of the objections to which I have before alluded. It is therefore no authority for the order complained of; but the grounds upon which Sir W. Grant put his order are conclusive against it; for he says: 'To the extent of allowing you to alter the prayer, I have no objection, but I can find no authority for amending the bill generally;' and again: 'I was disposed to permit the plaintiff to vary

(a) 12 Ves. 62.

his prayer, not extending it to any variation in the body of the bill further than he might upon the mere permission, to add a party.' In the present instance a new case is permitted to be made in the body of the bill, but no variation in the prayer. Cases of permission to amend, by adding parties, have no application to the present. Such amendments necessarily followed the adoption of the rule not to dismiss a bill for want of parties. Such statements as might be necessary to show them proper parties, or as in some cases, to show why proper parties could not be made defendants, were indispensable; but the suit as against the former defendant remained just as it was, so that the practice was not open to any of the objections inseparable from making a new case against existing defendants. Similar observations apply to a case of *Magdalen College v. Sibthorpe (a)*, in 1826, where leave was given to amend a bill by making it an information and bill or information only. There may, perhaps, be other objections to the order, but it does not assist the appellant's case. I think the order appealed from, if affirmed, might lead to the introduction of a dangerous practice. I must therefore discharge that order."

I may also refer to the observations of Lord Cottenham in *Belamy v. Sabine (b)*.

The order of the Lord Chancellor in the present case merely authorised the plaintiff to bring before the Court the parties beneficially interested in the several decrees in the cause of *Batchelor v. Blake*, and is therefore in no way at variance with the decision of Lord Cottenham in *Watts v. Hyde*; and it appears to me to be clear upon the authorities I have referred to, that the order of June 1847 would have been in direct conflict with those cases, if I were to put the unreasonable construction upon that order that it authorised the plaintiff to amend the bill by introducing the new statements affecting the original defendants, or varying the prayer of the bill. In *Palk v. Lord Clinton*, the order expressly authorised the amendment of the prayer of the bill.

The question then arises, whether the order of the Lord Chan-

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(a) 1 Rus. 154.

(b) 2 Phil. 447, 448.

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cellor authorised the filing of the present bill? I am clearly of opinion it did not. The order authorises the plaintiff to bring before the Court the parties beneficially interested in the decrees in *Batchelor v. Blake*, and the plaintiff has, under colour of that order, made four of the original defendants parties to the supplemental bill, varying the case against them, and varying in a very essential particular the relief prayed.

The cases referred to clearly show that the order made at the hearing would not have justified the plaintiff in altering the frame of the suit by amendment in the manner he has done; and it appears to me that the reasoning in those cases and the principle on which they were decided are equally applicable to the case of a supplemental bill. The cause is in this irregular state:—the bill of 1844 and the supplemental bill of the 6th of March 1847 (bringing before the Court Xaverius the fourth and his sister Florinda) make one case and pray one description of relief. The present bill makes a different case and prays different relief, bringing before the Court four of the original defendants and several new parties, but omitting from the present suit ten of the original defendants, and amongst the ten original defendants omitted from the present bill is the executor of the surviving trustee of the term of five hundred years' term created by the deed of 1773 to secure the sum of £10,000, a portion of which the plaintiff claims in this suit.

If this bill should be brought to a hearing along with the former suit directed by the Lord Chancellor's order to stand over, I cannot understand how any decree could be made in the two suits upon a record so framed, and I should think that if both suits were set down to be heard both ought to be dismissed, upon the principle decided in *Blackburn v. Staniland (a)*.

I am therefore of opinion that the Lord Chancellor's order of June 1847 did not justify the filing of the present bill; and that upon the authorities I have referred to, the bill is altogether irregular and contrary to the course of the Court, and that on that ground the demurrer should be allowed.

(a) 15 Sim. 64.

It has, however, been argued by Mr. *Maley* on the part of the plaintiff that the case of *Wood v. Wood* (a) is an authority for the present bill.

In that case Baron Alderson held that where an order was made at the hearing of the cause for liberty to amend by adding parties, the plaintiff might bring the new parties before the Court by supplemental bill; and that he might incorporate in such bill any matter which might, independently of the order to amend, be the subject of a supplemental bill. And it has been contended on the part of the plaintiff that the present bill, so far as it brings new parties before the Court, is sustainable by the order of the Lord Chancellor, and that the new matter is properly the subject of a supplemental suit in aid of the decrees in Batchelor's suit and to carry them into execution; and a passage from *Lord Redesdale's Treatise on Pleading*, 5th ed., p. 115, has been referred to, in which it has been laid down that "The Court in those cases (i. e., suits to carry decrees into execution) in general only enforces and does not vary the decree, but on circumstances it has sometimes considered the directions and varied them in case of a mistake." And in page 117, it is stated, "A bill for this purpose is generally partly an original bill and partly a bill in the nature of an original bill, although not strictly original, and sometimes it is likewise a bill of review or a supplemental bill, or both. The frame of the bill is varied accordingly."

In the case of *Hodson v. Ball* (b), Lord Lyndhurst, having adverted to the former passage in *Lord Redesdale's Treatise*, said, "Now there is no doubt of the correctness of that position, but the question is, what is the province of a supplemental bill in aid of a decree? I apprehend that a supplemental bill in aid of a decree cannot vary the principle of the decree. Its province is, to carry out the principle of the decree; to give full and complete effect to the decree as it exists. The instance that is generally given of a supplemental bill in aid of a decree is of this description—where there has been a decree to account, but directions have not been sufficiently given as to the manner of accounting, and a further decree is therefore

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(a) 4 Y. & Col. Exch. Cases, 135.

(b) 1 Phil. 180.

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required for the purpose of supplying this defect; that is, of carrying into full effect the original decree. In the case that was cited of *Dormer v. Fortescue* (a), Lord Hardwicke states what seems to be the foundation of the passage in *Mitford*, 'That supplemental bills are often brought even in aid of a decree of this Court;' and he illustrates that by the case to which I have referred, for he says, 'as in a decree to account for want of full directions before;' and the very case of *Dormer v. Fortescue* seems to be a case of that description, because there the original decree had established the title, but there was a doubt whether the Court would be justified in founding on that decree and on the existing record an order that the party should account for the rents and profits from the time when the title of the plaintiff had accrued; and for the purpose of supplying that supposed omission the supplemental bill was filed. Lord Hardwicke was of opinion that the proceedings were sufficient, but supposing, he said, that they were not, the supplemental bill had rendered them sufficient. Now, that was strictly a supplemental bill, for the purpose of carrying out and accomplishing the original decree, and the object of it not for the purpose of varying the principle of the decree; and therefore I apprehend the distinction is that which I have stated, that a supplemental bill in aid of a decree is not a supplemental bill that seeks to vary the principle of the decree, but one which takes the principle of the decree as the basis, and seeks merely to supply any omission which there may be in the decree or in the proceedings, so as to enable the Court to give full effect to its decision."

It is not necessary for me to decide the question, whether in the present case the bill seeks to vary the principle of the decrees in the suit of *Batchelor v. Blake*, and is therefore on the ground stated by Lord Lyndhurst unsustainable, because I am of opinion that even if the plaintiff's argument was well founded, the bill is defective for want of parties, whether it is considered to be a supplemental bill or an original bill or a bill in the nature of an original bill.

It has been decided that where a supplemental bill is filed merely

(a) 3 Atk. 124.

for the purpose of adding parties it is not necessary to bring the former defendants before the Court in the supplemental suit. In such case both the suits are set down and come on together and one decree is made in both the causes: *Greenwood v. Atkinson* (a); *Dyson v. Morris* (b); *Jones v. Howells* (c); *Holland v. Baker* (d); *Parker v. Carter* (e). But where the frame of the suit and the relief prayed are altered, as in the present case, and that accordingly some of the defendants in the original suit are made parties to the supplemental bill, and where all the defendants are interested in the new question raised by the present bill, that the decrees in Batchelor's suit should be rectified and carried into execution with the modifications and alterations stated in this bill, it appears to me that all persons who were necessary parties to the suit of 1844 are necessary parties to the present bill; at all events Mr. William Stewart, the personal representative of the surviving trustee of the term of five hundred years in the settlement of 1773, is a necessary party to the suit, the prayer of this bill seeking that the said term may be sold to pay the plaintiff and all other persons entitled to portions of the charge of £10,000, the amount due to them respectively which that term was created to secure.

If this was to be considered as an original bill, whether a bill to carry into execution the decrees in Batchelor's suit, or a bill of review to rectify those decrees, it would also be defective for want of parties. I may further observe that the bill is not framed as a bill of review to rectify the error in the decrees in the cause of *Batchelor v. Blake*, and it is not open to the plaintiff to sustain the bill as a bill of review; but I apprehend that even if framed for that purpose it could not be sustained as a bill of review, more than twenty years having elapsed since the said decrees in Batchelor's suit.

The ground, however, upon which I decide this case is, that the Lord Chancellor's order did not authorise the filing of the present

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(a) 5 Sim. 419.

(c) 2 Hare, 350.

(e) 4 Hare, 406.

(b) 1 Hare, 420.

(d) 3 Hare, 73.

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bill ; that the cause having stood over only for the purpose of bringing new parties before the Court, the plaintiff was not justified, at that stage of the proceedings, in filing a supplemental bill altering the case against the defendants who were before the Court at the hearing ; putting in issue matter not properly supplemental, as it had all occurred previous to the filing of the bill of 1844 ; making four of the original defendants parties to this bill with the view of putting in issue the new facts as to them, and praying the new relief ; leaving out from the present record ten of the original defendants, and having the record in this unprecedented form, that the original suit of 1844 makes one case, and prays one description of relief against the defendants thereto, omitting parties whom the Lord Chancellor considered to be necessary parties ; and when the case stood over to allow of those parties being brought before the Court, the present bill is filed, making a different case and praying different relief ; and if both causes should be set down together, the Lord Chancellor would have to decide upon two distinct cases upon two distinct records, one class of defendants only being parties to one record, and another class of defendants parties to the other record.

How one decree could be made on both records, I am at a loss to understand, the matters in issue in each suit being different ; the case made in each suit being different ; the relief prayed in each suit being different, and the defendants in each suit being different. Such a bill I believe never before was filed ; and concurring entirely in the opinion of Lord Cottenham in *Watts v. Hyde*, and with Vice-Chancellor Wigram in the opinion expressed by him in the cases referred to, I shall allow the demurrer with costs.

I may observe that I offer no opinion whether, if such bill as the Lord Chancellor's order would have warranted had been filed, merely bringing before the Court the new parties without varying the case or the prayer of the bill of 1844, it would have been competent to the Court to have made a decree carrying into execution the decrees in Batchelor's suit, with the modifications and alterations suggested.

Allow the demurrer with costs.

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SWIFT v. SWIFT.

July 10.

MR. HUGHES, for the plaintiff, moved that the bill be taken as confessed against the defendant W. H. Arthur.

Form of the order on motion to take the bill as confessed against a defendant alleged to be of unsound mind.

Mr. Martley, with whom was Mr. Leslie, contra, stated that the defendant was of weak mind, and contended that the plaintiff should have applied to have a guardian appointed to appear and answer, instead of moving to take the bill as confessed: *O'Brien v. Mahon* (a); *Shelford on Lunacy*, p. 425.

Argument.

Mr. Hughes, in reply, cited *Crawford v. Kernaghan* (b), and contended that he was entitled to a reference to the Master to ascertain the state of mind of the defendant.

The MASTER OF THE ROLLS made the following order:—

It being stated to the Court that the said defendant William Henry Arthur is a person of unsound mind and unable to put in an answer—no rule. And let it be referred to the Master to enquire and report whether the defendant W. H. Arthur is a person of unsound mind and incapable of answering and defending his rights in this cause; and if so, let said Master appoint a fit and proper person as guardian *ad litem* for said defendant W. H. Arthur to answer for and defend his rights in this cause, and that such person so to be appointed do take special care that such defendant W. H. Arthur's rights be put fully in issue by the answer to be so filed in this cause.

Order.

Rolls Motion Book, 253, fol. 286, 1847.

(a) Cr. & Dix, N. C. 138.

(b) 1 Dr. & W. 195.

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WEBB v. CASHEL.

July 17.

The receiver being insane, the Court made an order that his surviving surety might pass the account, and that on the balance being lodged, the recognizance should be vacated, and gave the surety the costs of the motion, and of vacating the recognizance.

Order.

MR. STOKER, on behalf of David England Young, the surviving surety of the receiver in this cause, moved that he should be at liberty to pass the account of the receiver before the Master, he the surety undertaking to lodge whatever balance should appear to be due by the receiver within a week after the passing of the account; and that the receiver be discharged and his recognizance be vacated, and for a reference to appoint a new receiver. The receiver was insane. *Richardson v. Ward* (a) was cited in support of the motion.

The following order was made by his Honor :—

Be it so; and on production to the Clerk of the Recognizances of this Court of the receipt for the payment of such balance as may be found due on foot of said account, let the recognizance of the said receiver and his sureties, enrolled on the 14th of June 1843, be vacated, and a vacate entered on the enrolment thereof by the Clerk of the Recognizances of this Court, and let said D. E. Young lodge such account within two months from the date of this order, and deducting from the balance of said account £7 as and for the costs of this motion, and vacating said recognizance; and let the plaintiff have the carriage of this order.

Rolls Motion Book, 255, fol. 56, 1847.

(a) 6 Mad. 266.

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BEAMISH v. PHAIRE.

July 22.

THIS was a motion to show cause against the appointment of a receiver under the 5 & 6 W. 4, c. 55. It appeared on affidavits that the judgment on which the petition was presented was marked in the Queen's Bench at an early hour on the 21st of December 1846, and registered immediately afterwards on the same day. That according to the practice of the offices of the Queen's Bench judgments do not appear upon the books of that Court until the day after they are entered. That on the same day (the 21st of December 1846), a deed was executed by the respondent Phaire, and registered at about a quarter past eleven in the forenoon. That the attesting witness, on the same day at three o'clock, searched in the proper office of the Court of Queen's Bench, and no judgment had then been entered. By the deed the respondent conveyed to Richard S. Ireland certain lands therein named, in trust to pay and satisfy the creditors of the respondent named and referred to, and all the then present and future judgment creditors of the respondent according to their priorities. An annuity of £400 a-year was reserved by the deed to the respondent. It was not executed by R. S. Ireland or any of the creditors.

Receiver appointed on a judgment notwithstanding a voluntary deed executed the same day as the judgment was entered, the judgment having relation back to the first day of the preceding Term.

Statement.

Mr. Serjeant *Warren* and Mr. *Chatterton*, in support of the petition, argued that the deed was voluntary, and created a trust, not for the creditors, but for the respondent himself: *Walwyn v. Coutts* (a); *Garrard v. Lord Lauderdale* (b); *Bill v. Cureton* (c). Supposing the deed valid, and the judgment to date from the day of its entry, the trust created by it was extendible by the Statute of Frauds. But the judgment had relation back to the first day of the

Argument.

(a) 3 Mer. 707; S. C. 3 Sim. 14. (b) 3 Sim. 1; S. C. 2 Rus. & M. 451.
(c) 2 M. & K. 503.

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preceding Michaelmas Term, for the provisions of the Statute of Frauds applied only in favour of purchasers for valuable consideration and *bona fide*, and all claiming under the deed were volunteers: *Sutton v. Pigot (a)*.

Mr. *Otway*, for R. S. Ireland, relied on the deed as one for valuable consideration conveying the legal estate to him, and executed and registered before the judgment was entered. He cited *Wilding v. Richards (b)*; *Brown v. Cavendish (c)*; *Chick v. Smith (d)*; *Smith v. Hurst (e)*.

THE MASTER OF THE ROLLS.

Judgment.

The relation of the judgment to the previous Term is taken away by the Statute of Frauds as against purchasers *bona fide* for valuable consideration. Mr. Ireland was not, in my opinion, a purchaser within that statute, and the receiver must be appointed, the judgment having priority to the voluntary deed.

(a) 1 Hog. 200.

(b) 1 Col. 655.

(c) 1 Jo. & Lat. 606.

(d) 8 Dowl. Pr. Ca. 337.

(e) 1 Col. 705.

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KIRKWOOD v. LLOYD.

Nov. 19, 25.

THIS case came on be heard on exceptions taken by the plaintiff to the Master's report of bad title. The facts of the case and the exceptions are fully stated in his Honor's judgment.

The *Attorney-General* (Mr. Moore) and Mr. *Alexander Graydon*, in support of the exceptions.

The *Solicitor-General* (Mr. Monahan) and Mr. *John M'Mahon*, contra.

Fenny v. Duran (a); *Denn v. The Earl of Abingdon* (b); *Earl of Stamford v. Nedham* (c); *Hanger v. Fry* (d); 1 *Rolle Abr.* pp. 404, 905; *Hunger v. Frey* (e); *White v. White* (f); *Martin v. M'Causland* (g); *Farrell v. Gleeson* (h); *Putman v. Bates* (i); *Boyd v. Belton* (k) were cited.

THE MASTER OF THE ROLLS.

In this case, Mr. James M'Ternan became the purchaser under the decree in this cause, of the lands of Ballinabrina in the county of Leitrim.

were tenants for life of A. No interest was actually paid from 1805 to 1837, when the judgments were again assigned, and interest paid on them until 1841.

Held, That B. & M. being the parties bound to pay the interest, and also beneficially entitled to it, there was in contemplation of equity a payment of interest from 1805 to 1837, which saved the bar of the statute as against the lands of X.

Martin v. M'Causland, 3 Ir. Law Rep. 113, and *Warrens v. O'Shea*, 5 Law Rep. N. S. 77, observed on, and disapproved of.

Judgments were obtained in 1738 against G. R., who was seized of the lands of A and X. In 1786 the lands of X were conveyed to a purchaser. In 1840 the judgments were revived against the heir of G. R. and the terre-tenants of A. *Held*, that the revivor did not give a new present right against the lands of X to save the bar of the Statute of Limitations.

Interest on the judgments was paid by those entitled to the lands of A until 1805, when the judgments were assigned to a trustee for B. and M., who

(a) 1 B. & Ald. 40.

(c) 1 Lev. 160.

(e) F. Moor, 341.

(g) 3 Ir. Law Rep. 113.

(i) 3 Russ. 158.

(b) 2 Dong. 473.

(d) Cro Eliz. 310.

(f) 3 Ir. Law Rep. 118, n.

(h) 11 Cl. & Fin. 702.

(k) 8 Ir. Eq. Rep. 113.

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A reference having been made to the Master to enquire and report whether a good title could be made out to the said purchaser, the Master has reported that a good and sufficient title cannot be made to the said lands and premises so purchased by the said James M'Ternan, because the several judgments, recognizances and Crown bonds, set forth in the schedule to the report mentioned, now outstanding against George Reynolds, James Reynolds and Robert Lyons (all of whom formerly held the lands in fee), affect the fee-simple of said lands, and are now incumbrances attaching thereon.

Three exceptions have been taken to the report by the plaintiff; first, that the judgments, Crown bonds and recognizances, in the schedule to the report mentioned, do not, nor do any of them affect the purchased lands; secondly, that two judgments obtained in Michaelmas Term 1738 by one Richard Taylor against George Reynolds, Esq., the one for £1000 and the other for £2000, do not affect the purchased lands. The third objection is the formal objection that the Master should have reported good title.

It has been stated that the several Crown bonds and recognizances stated in the schedule to the report have been satisfied since the Master made his report, save and except the two judgments of 1738; and therefore the only question for the Court to decide on the objections to the report is, whether the two judgments of 1738 or either of them affect the fee-simple of the purchased lands, and are now incumbrances attaching thereon as found by the Master?

The facts of the case as to these judgments are as follow:—

In Michaelmas Term 1738, Mr. Richard Taylor obtained two judgments against George Reynolds, one for £1000, the other for £2000. George Reynolds the conuzor was, at the time of the rendition of the judgments, or afterwards, seised in fee of several denominations of lands. These lands became vested in George Reynolds the younger in fee, and in the year 1786 he conveyed a portion of them to Robert Lyons in fee.

The lands so sold to Robert Lyons in 1786 are the lands which have been sold in the present suit to pay the said Robert Lyons's debts, and upon which lands the Master has found that the two judgments of 1738 are now subsisting incumbrances. No interest

was ever paid by Robert Lyons or any person on his behalf on foot of the said judgments; nor were the same ever revived against him or against any person having any estate or interest in that portion of the lands so sold to him in 1786; and the question is, whether the proceedings taken against the parties claiming the unsold portion of the estates, or the fact of interest having been paid by such persons on foot of the said judgments, has been sufficient to take them out of the operation of the Statute of Limitations?

That portion of the estates of the conuzor of the judgments of 1738 which was not sold to Robert Lyons in 1786 became vested in Bridget and Mary Reynolds the daughters of George Reynolds the younger, as tenants for life. Bridget Reynolds married some person whose name was not I believe stated to me, and Mary Reynolds married Mr. Peyton; and Bridget and Mary, who were thus entitled as tenants for life to the portion of the estates which was not sold to Robert Lyons in 1786, paid off the two judgments of 1738. A deed was executed on the 1st of December 1807 by Richard Taylor the personal representative of the conuzee of the judgments of 1738 to Mr. F. M'Carthy, who was trustee for the said Bridget and Mary the tenants for life and their husbands.

In 1837 Jane Peyton the daughter of Mary Peyton one of the tenants for life married Mr. Lambert, and a marriage settlement was executed on that marriage. I have not seen any copy of that settlement; but as I have understood the statement of Counsel, the two judgments were assigned to Mr. Lambert and interest was to be paid during the lifetime of the said Bridget; but the principal of the judgments was not to be raised in her lifetime.

Mr. Lambert assigned the judgments to the Patriotic Insurance Company on the 17th of February 1840, and an affidavit having been made by Mr. Lambert, with a view of having the judgments revived, it was stated that interest was paid on the judgments until 1805, when they were paid off by Bridget and Mary, who had become tenants for life of the estates of the conuzor of the judgments which had not been sold in 1786 to Robert Lyons. From

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that period to 1837 no interest was paid, the judgments being vested in Mr. M'Carthy as trustee for Mary and Bridget the two tenants for life, who were the persons to pay and receive interest on the judgments. But from 1837, the date of the marriage of Mr. Lambert with Jane Peyton the daughter of Mary Peyton, the interest was paid down to the year 1841, at which time the judgments were revived against the heirs of the conuzor and against the terre-tenants of the portion of the estates which were not sold to Robert Lyons in 1786.

Two questions arise in this case; first, whether the revivals in 1841 of the judgments of 1738 against the co-heiresses of the conuzor of the judgments, and against the terre-tenants of the portion of the estates which was not sold to Robert Lyons in 1786, make these judgments subsisting incumbrances against the estate sold in 1786 to the said Robert Lyons? secondly, whether the payment of interest already stated takes the case out of the operation of the Statute of Limitations? These two questions are perfectly distinct, and the first question is to be considered without any reference to the alleged fact of interest having been paid under the circumstances already stated.

Assuming therefore that no part of the principal or interest had been paid on foot of the judgments, and that there was no acknowledgment in writing within the proviso of the 40th section of the Act, the first question is, whether the revival of the judgments in 1841 against the co-heiresses of the conuzor of the judgments of 1738 and against the terre-tenants of the lands which were not sold to Robert Lyons in 1786, had the effect of creating a new present right in 1841 to recover the amount of the judgments against those representing Robert Lyons's estates so purchased in 1786?

The Counsel for the purchaser insists that, although not a shilling of interest had been paid on foot of those judgments recovered one hundred and nine years ago, and although there was no acknowledgment in writing within the proviso of the 40th section, Robert Lyons, who purchased a portion of the estates of the conuzor sixty-two years ago, is to be affected by a revival in 1841 of those judgments of 1738, the representatives of the estate of Robert Lyons

never having been served with the *scire facias*, and the revival having been in fact only against the co-heiresses and the tenants of the lands which were not sold in 1786. It is now to be considered whether there is any legal foundation for this proposition.

By the 40th section of the statute, no suit shall be brought to recover any sum of money secured by judgment or otherwise charged upon or payable out of land, "but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent."

Judgments may be divided into two classes; first, judgments *in rem*; secondly, judgments *inter partes*. In the note to *The Duchess of Kingston's case* (a), the distinction is pointed out between those classes, the former being conclusive as between all parties whatever; the effect of the latter being much more limited. Judgments *in rem* have, however, no application to the case before the Court. In a subsequent page Mr. Smith says:—"Next, with regard to the judgment of a Court of record *inter partes*. The great maxim which governs its effect is, *res inter alios acta alteri nocere non debet*. The rule laid down in the celebrated judgment of De Grey, C. J., is, it will be recollected, that the judgment is conclusive between the same parties. In *Buller's Nisi Prius* the rule and the reason for the rule are stated to be, that the verdict ought to be between the same parties, because otherwise a man might be bound by a decision, who had not the liberty to cross-examine; and nothing can be more contrary to natural justice than that a man should be injured by a determination that he, or those under whom he claims, was not at liberty to controvert. To the same effect is *Comyn's Digest*, tit. *Estoppel*, Co. Lit. 352; *Gaunt v. Wainman* (b)." *Ubi per*

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(a) Smith's Leading Cases, 1st ed., vol. 2, p. 439, *et seq.*

(b) 3 Bing. N. C. 69.

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Tindal, C. J. 'According to *Co. Lit.* 352 *a*, every estoppel ought to be reciprocal; and that is the reason that, regularly a stranger shall neither take advantage of, nor be bound by the estoppel. It would be hard indeed if it were otherwise.' Mr. *Smith* then states:—

"The words above printed in italics from the passage in *Buller* give the proper expression of the extent to which estoppels are permitted under this rule. It would be hard, it is remarked, 'that a man should be injured by a determination that he *or those under whom he claims* was not at liberty to controvert.' The record therefore of a verdict followed by a judgment in a suit *inter partes* will estop first, parties, and secondly, privies thereto." Then, after stating the authorities he says:—"It must be observed, however, that a verdict against a man suing in one capacity will not estop him when he sues in another distinct capacity, and in fact, as a different person in law: *Robinson's case* (a); *Com. Dig. Estoppel*, C." He then states:—"Privies are divided by Lord Coke into three classes; first, privies in blood; secondly, privies in law; thirdly, privies by estate. The doctrine of estoppel, however, so far as it applies to persons falling under each of these three denominations, applies to them on one and the same principle, namely, that a party claiming through another is estopped by that which estopped that other, respecting the same subject matter. Thus an heir who is privy in blood would be estopped by a verdict against his ancestor, through whom he claims: *Loche v. Norborne* (b). An executor or administrator suing as such would be bound by a verdict against his testator or intestate to whom he is privy in law. *R. v. Hebden* (c); Lord Coke tells us in the passage cited by Lord Ellenborough in *Outram v. Morewood*, that, 'The lord by escheat, the tenant by the curtesy, the tenant in dower, and the incumbent of a benefice shall be bound by and shall take advantage of estoppels.' *Co. Lit.* 352, *b*. It will have been seen that in that very case it was decided that a verdict against a wife would bind the future husband." Mr. *Smith* then states:—"With

(a) 5 Rep. 82, b.

(b) 3 Mod. 141

(c) And. 389.

regard to privies in estate it is apprehended that a verdict against the feoffor will estop the feoffee, and against the lessor, the lessee; *et sic de similibus*. In *Doe v. The Earl of Derby* (a), (which was also a case not of estoppel but of admissibility), Mr. Justice Littledale remarks, at p. 790:—‘A passage has been cited from *Comyn’s Digest, Evidence*, A, 5, where it is said that a verdict in another action for the same cause shall be allowed to be evidence between the same parties. So it shall be evidence when the verdict was for one under whom any of the present parties claim.’” Judge Littledale adds:—“But that must mean a claim acquired through such party subsequently to the verdict.” In some of the books it is stated that there are privies by representation. The argument of the purchaser’s Counsel is directly at variance with the rule of the Common Law that a judgment is only binding on parties and privies. It is scarcely necessary to do more than to advert again to the facts, to show the application of the principle to the present case:—Robert Lyons purchased this property for valuable consideration in 1786; not a shilling has been paid by him or any other person acting for him or representing him, on account of the judgment. The judgment on the *scire facias* was obtained without service on him or the terre-tenants of the lands so purchased by him, and was simply a judgment of revivor on a proceeding against the heir-at-law of the conuzor and the terre-tenants of the unsold estate. I am at a loss to understand what privity there was between the purchaser of 1786 or those deriving under him and the heir-at-law and the tenants of the unsold estates, so as to make the judgment of revivor against the heir and terre-tenants of the unsold lands evidence against the purchaser, who had purchased the lands of Ballynabrina more than half a century before the judgment of revivor.

It is now necessary to examine the authorities upon the statute of the 3 & 4 W. 4, c. 27, which it is contended have put an end to the sound and just principle of the Common Law to which I have adverted.

In *Keely v. Bodkin* (b) the important fact is omitted in the report,

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(a) 1 Ad. & El. 783.

(b) 5 Law. Rec. N. S. 224.

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that the *scire facias* had been served upon the purchaser; but in the report of the same case in *Sausse & Scully* (a), it appears that the purchaser had been served with the *scire facias*; but through the inadvertence of his solicitor defence was not taken, and judgment of revivor was marked against him. He sought to go behind the judgment of revivor against himself, which it was plain he could not do.

In *Finch v. Fitzgibbon* (b) the revival was against the conuzor himself. The point raised was, that although a present right first accrued at the date of the judgment, which was more than twenty years before the issuing of the *scire facias*, yet a new present right accrued on the revivor, and that although there was no payment of interest or any acknowledgement in writing within twenty years the plaintiff was entitled to issue execution. But it was not attempted to raise such a point as this, that a judgment in *scire facias* bound persons who were neither parties nor privies.

The next case was *Farran v. Beresford* (c). It appears from the report of that case that in the year 1810 judgment was obtained by Henry Ottiwell against John Dunbar. Subsequently to the entering of the judgment and in the year 1813, Dunbar assigned certain freehold premises to William Farran. In the year 1817 the executors of Ottiwell, who had died, having issued a writ of *scire facias* obtained judgment of revivor against the conuzor of the judgment John Dunbar. Dunbar having died, a writ of *scire facias* was issued in 1837 against his heir and terre-tenants. William Farran pleaded the Statute of Limitations 3 & 4 W. 4, c. 27. He however merely pleaded as a terre-tenant and did not state on the record that he was a purchaser of the lands, or that the purchase was prior to the revivor of 1817; and the sole question which arose on the pleadings, except the question of departure, was, whether the judgment of revivor against the conuzor of the judgment created a new present right in 1817 as against John Dunbar? Farran did not raise the question that he was a purchaser prior to

(a) San. & Sc. 211.

(b) 6 Law Rec. N. S. 312.

(c) 2 Ir. Law Rep. 110; S. C. on appeal, 10 Cl. & Fin. 319.

1817, and therefore not a privy in estate. He pleaded as terre-tenant, and in that character he was privy in estate and bound by the judgment against Dunbar. The House of Lords considered it not necessary to decide the question whether the judgment of revivor created a new present right, as the replication was a departure and bad on that ground; but it was intimated in that case (of which there is now no doubt) that the revivor created a new right against the conuzor and fixed a new terminus from which the twenty years were to run; and of course the judgment of revivor which gives a new present right as against the conuzor is binding on privies in estate and by representation, and on all persons deriving under the conuzor subsequently to the judgment.

The next case on the subject to which I shall advert is the case of *Ryan v. Cambie* (a). Baron Richards states (page 340 of the report):—"It has been said by Counsel in argument that the revival in 1828 must be considered a revival against the heir and such only of the terre-tenants as were served, but not against any other person interested in the lands, the Irish statute dispensing with the necessity of serving all the terre-tenants, and thereby authorising in a manner a partial revival. But on looking to the bill I find that the terre-tenants of the lands, in right of which lands the demurring parties have been brought before the Court, were duly served with the *scire facias* on which the revival of 1828 was founded. Then again it is said that with respect to one denomination of those lands, viz., Kilgarvin, the defendant Solomon Cambie, one of the parties demurring, was at the time entitled as tenant in tail in remainder under the will of the conuzor, expectant on the death of his father Edward Cambie, and that he was not served. In answer to this, it might be sufficient to say that the several demurring parties are also brought before the Court in respect of another denomination, Ballyscanlan as well as Kilgarvin, and I would collect from the bill that Ballyscanlan was not subject to any entail, but taken by the defendant Solomon Cambie as the heir of his father Charles Cambie." And then Baron Richards added:—"But I feel no difficulty in holding,

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(a) 2 Ir. Eq. Rep. 328.

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that if the revival be good against the terre-tenants, it is good also against all persons not terre-tenants or in possession, who may have remote or contingent interests in the lands. I never can accede to the argument that it is necessary to seek out all the limitations to which an estate may be subject, and to serve all persons interested therein in order to have an effectual revival of a judgment. The creditor only seeks to deal with the possession, and he is not expected to look beyond the heir and the terre-tenants, or parties in possession of the lands of the conuzor." Sir Edward Sugden, in observing on *Ryan v. Cambie* (a), said:—"I agree with Baron Richards in *Ryan v. Cambie*, that nothing would be more dangerous than to hold, that because the tenant in tail in remainder was not served, it would be no revivor. A man would have to hunt through every settlement of an estate before he could revive a judgment."

But that is totally different from the question raised in the present case; and it does not follow from any of these cases that if you serve the tenants in possession of Blackacre, you bind the owner of Whiteacre.

It is a startling proposition, that a revival of a judgment one hundred and ten years old, against one denomination in the hands of the heir and terre-tenants of the conuzor, should bind the purchaser of another denomination who purchased more than half a century ago, where neither he nor the terre-tenants of the purchased lands were served with the *scire facias*.

All persons who are privies in estate, and all persons who are privies by representation, are bound by a judgment of revivor; but in my opinion strangers are not; and I am clearly of opinion that Robert Lyons and those deriving under him were strangers and not privies, and therefore not bound by the revival.

The case of *Farrell v. Gleeson*, decided in the House of Lords, is reported in 7 *Irish Law Reports*, p. 478, and 11 *Clarke & Fin.* p. 702. The report in the 7 *Irish Law Reports* contains the fullest statement of the facts:—In Trinity Term 1813, John Gleeson obtained a judgment against Michael Keane. On the 5th of April

(a) *Franks v. Mason*, 9 Ir. Eq. Rep. 365.

1821, articles of agreement were entered into previously to the marriage of Jane Keane, one of the daughters of Michael Keane, and the appellant Mr. Farrell, whereby Michael Keane covenanted with the appellant to execute such deed or deeds as Counsel should direct, for conveying to the trustee of the marriage settlement the lands and premises therein mentioned, upon the trusts therein mentioned, and subject thereto to the sole and only use of the appellant, his heirs and assigns for ever. Michael Keane died in 1825, and John Gleeson in 1828, and in 1829 the executors of John Gleeson issued a *scire facias* against the heir of Michael Keane and the terre-tenants of the lands in the marriage articles executed on the appellant's marriage, and obtained a judgment of revivor. On the 18th of June 1833, the judgment was redocketed. On the 18th of April 1838, the respondent, who was the personal representative of John Gleeson, filed a bill against Mr. Farrell the appellant, and others, for an account of the sums due on the judgment, and for a sale of the said lands. Mr. Farrell pleaded to the bill the Statute of Limitations; and the question raised was, whether the judgment of revivor created a new present right from which the twenty years were to run? It did not appear whether Mr. Farrell had been served with the *scire facias*. The plea was overruled, and Mr. Farrell having answered, and the same question having been raised, the plaintiff obtained a decree; and Mr. Farrell having appealed from the order overruling the plea and from the decree, the House of Lords affirmed the decision of the Court of Exchequer in Ireland. That case does not establish that a judgment of revivor binds strangers. Mr. Farrell had no legal title whatever. The judgment was revived against the heir of the conuzor of the judgment and against the terre-tenants of the lands contained in said marriage articles. A man (as Sir Edward Sugden said) is not to hunt through every settlement of an estate before he can revive a judgment. The estate was bound by the revivor against the terre-tenants and all persons having equitable interests in it.

In the case of *White v. White (a)*, it was decided that a

(a) 3 Ir. Law Rep. 118, n.

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judgment of revival against R. White, the heir-at-law of the conuzor of the judgment, was binding after the death of R. White on Henry White, who, after the death of R. White, was the heir of the conuzor. In that case Henry White was privy in blood and privy in estate to R. White; and the decision does not establish what the purchaser contends for, that a judgment is binding on a stranger.

I now come to the case of *Martin v. M'Causland* (a). I was one of the Counsel for the defendant in that case, and we were of opinion that a writ of error should be brought. In that case it was decided by the Court of Common Pleas, in a *scire facias* to revive a judgment against the heir and terre-tenants of the original conuzor, that a replication of a revival of the same judgment against the personal representative of the original conuzor, within twenty years from the issuing of the *scire facias*, was sufficient. That judgment was reversed by the Court of Exchequer Chamber on the ground of departure, which the House of Lords had decided in *Farran v. Beresford*; and I have been informed by Mr. *M'Causland*, who was one of the Counsel in the case, that the Court, in order to afford the plaintiff the opportunity of having the decision of the House of Lords on the main question, offered him liberty to amend the record by stating the judgment of revival in the *scire facias*; but he declined to do so, and has never proceeded since to recover the amount of the judgment. *Martin v. M'Causland* is the only case which I have been able to find, in which it has been held that a judgment *inter partes* is binding against a stranger.

In the case of *Putman v. Bates* (b) a question arose on the Statute of Limitations then in force. Under the provisions of the 47 G. 3, c. 74, the real estate of a trader is rendered liable to his simple contract debts; and it was decided that an admission by the trader's executor, within six years before the filing of the creditor's bill, would not take the debt out of the Statute of Limitations, so as to enable the creditor, under the 47 G. 3, to claim payment out of the real estate in the hands of the devisee. Lord Lyndhurst

(a) 3 Ir. Law Rep. 113.

(b) 3 Russ. 188.

asked "how the act of the executrix could be evidence against the devisee or heir?" and he further said:—"If in a proceeding at law, the plaintiff were to recover on a promise made by the executrix, he can scarcely contend that such a judgment would be evidence against the heir or devisee."

In *Marten v. Whiehelo* (a) it was decided by Lord Cottenham that a judgment against the executor was not evidence against the devisees of the testator's real estate.

In *Grenfell v. Girdlestone* (b) the bill was filed in 1833, previously to the 3 & 4 W. 4, c. 27, coming into operation, to raise the amount of a judgment of 1805, out of real estate. It appeared in the course of the argument that the judgment had been revived in 1819 against the executor of the conuzor; and the Counsel for the defendant stated it would be a wild proposition to contend that such a revival had kept the judgment alive against the lands; on which Baron Alderson observed "it left the judgment as of 1805." The plaintiff's Counsel fully acquiesced, the point not having been adverted to by them; and Baron Alderson, in giving judgment, observed that "no attempt had been made to fix the land with the debt for upwards of twenty years."

The case of *Mahon v. Davoren* (c) was decided on the language of the 8 G. 1, c. 4., and that Act having been repealed it is not necessary to advert to the case. It is to be observed that I do not decide that in no case would a judgment of revivor against one denomination be evidence against the terre-tenants of another denomination. Suppose the conuzor of a judgment died seised of the lands of Blackacre in the county of A, and of Whiteacre in the county of B, and that those lands were respectively in the hands of tenants, and that the reversion of both denominations became vested in the same person, whether heir-at-law or devisee or entitled in remainder under a family settlement; in such a case, if there was a judgment of revivor against the reversioner and the terre-tenants of Blackacre, that judgment might be evidence against the terre-tenants of Whiteacre who are privies in estate with the reversioner. All

(a) 1 Cr. & Phil. 257.

(b) 2 Yo. & Col. Ex. 672.

(c) 2 H. & Br. 523.

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that it is necessary for me to decide at present is, that where Blackacre and Whiteacre are vested in two different persons, one claiming as purchaser for valuable consideration, a judgment of revivor against the owner and the terre-tenants of the unsold portion of the lands (such revivor being after the sale) in no way affects the purchaser of the sold lands or the terre-tenants of the sold lands, who have not been served with the *scire facias*, they not standing in privity with the parties against whom the judgment of revivor was obtained. I am of opinion that there is not the slightest foundation for saying that the revivor affected the sold lands.

The other question is of a more difficult character: it is this; there is an allegation of payment of interest on the judgment. The circumstances connected with this alleged payment are very singular. In 1805 the unsold lands were vested in the two co-heiresses-at-law of the conuzor whose estate was cut down to an estate for life. They bought up the judgments and got them assigned to M'Carthy as a trustee for them. The consequence was, that they filled the double character of debtor and creditor. No interest appears to have been actually paid from 1805 to 1837. From 1837 to 1841 interest was paid; but in the interval between 1805 and 1837 no interest had been paid. Under these circumstances the question is, whether there was such a payment of interest as kept the judgment alive? A Court of Law would probably hold that there was not, and would not look to the circumstance of the same person being debtor and creditor. M'Carthy was the person legally entitled to receive the interest. The tenants for life were the persons to pay to their own trustee. I am disposed to think that a Court of Law would not recognise the trust. If that be so, the judgment is barred at law by the Statute of Limitations. In *Morrogh v. Power* (a) the Lord Chancellor, then Chief Baron, said, that "with regard to all judgments which at the time of the passing of the Act 3 & 4 W. 4, were barred and extinguished by the operation of the 8 G. 1, the effect of the former Act was not to revive or set them up again; that the suits or proceedings contemplated by the recent statute were suits

(a) 5 Ir. Law Rep. 505.

for valid and subsisting demands; in other words, demands for which at that time the judgment was a valid and subsisting security." For twenty-seven years previous to the 3 & 4 W. 4, c. 27, in the view of a Court of Law, no interest was paid on these judgments.

But there appears to me to be an equitable ground on which these judgments may be held to be subsisting judgments, which was not argued before me. Lord Redesdale lays it down in *O'Fallon v. Dillon* (a), that where the same person is to pay and to receive, the Statute of Limitations does not run, because where the same person is to pay and to receive, a Court of Equity ought to consider that the payment has actually taken place. In a recent case, *Burrell v. Lord Egremont* (b), the same doctrine is laid down. In that case a tenant for life bought up a judgment and got it assigned to a trustee for himself; he therefore was the person to pay and to receive the interest. Lord Langdale says:—"It was contended that if the duty to pay comprised no duty to any one but the party entitled to receive, the Court would not interfere, or in any way qualify the acts of the tenant for life, for the purpose of deeming the duty to be satisfied or not. I agree to that; but in the case of a tenant for life, owner of a charge on the inheritance, it is not merely in relation to the party himself that the duty of paying the interest arises; he receives the income and is entitled to the interest payable thereout; and when he has received the income he is deemed to have paid or kept down the interest, not because of any duty which he owes to himself, but because he has a duty to another, i. e., to the remainderman, to prevent the accumulation of interest against him (c)."

The observations of Lord Redesdale and Lord Langdale amount to this, that where the same person is to pay and receive, a Court of Equity presumes that the money was paid; and therefore, in contemplation of a Court of Equity there was a payment of interest in this case between 1805 and 1837, the same persons being entitled to the judgments, and having a life interest in the estate. The only

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(a) 2 Sch. & Lef. 20.

(b) 7 Beav. 237.

(c) See *Wynne v. Styon*, 2 Phil. 303.

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question then is, whether that was a payment of interest by persons competent to bind the sold estates? If I was to decide that question irrespectively of authority, I should be of opinion that there was not a sufficient payment to take the case out of the Statute of Limitations, as to the sold lands, the payment being by a person not in privity with those who represent the estates sold in 1786. But it was decided in the case of *Warrens v. O'Shea (a)*, where a joint and several bond was executed by A as principal and B as surety, and the surety died in 1812, and judgment was entered up against A in 1817, and interest was paid on such judgment up to 1827 by A, that such payment took the case out of the Statute of Limitations as against the representative of B, who died in 1812; and that an action upon the bond as a several bond was sustainable by the obligee against the personal representative of B in the year 1835. I was of opinion at the time that case was decided, and entertain the same opinion still, that the payment of interest was not by a person authorised to pay so as to bind the representative of B, and that the cases referred to in the course of the argument in that case, and which have been decided in England, are opposed to the decision. The language of the Act 8 G. 1 does not materially differ from the 3 & 4 W. 4, c. 27, s. 40. The result of the decision of *Warrens v. O'Shea* is, that a payment on foot of a debt by any person liable thereto is a payment which will take the case out of the statute as against every person also liable to the debt, whether standing in privity or not. The cases in England establish that the payment, in order to affect another person liable to the same debt, must be by a person expressly or impliedly authorised to make the payment on behalf of the person sought to be affected thereby (b). But as the case of *Warrens v. O'Shea* is a binding authority in this Court, I do not think I can compel the purchaser to accept the title where interest has, according to the cases before Lord Redesdale and Lord Langdale, been in effect paid up to a recent period. I must therefore confirm the report.

(a) 5 Law Rec. N. S. 77.

(b) See *Atkins v. Tredgold*, 2 B. & C. 23; *Slater v. Lawson*, 1 B. & Ad. 396; *Way v. Bassett*, 5 Hare, 55; and see *Putnam v. Bates*, 3 Rus. 188.

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June 24.

THE lands of Ballyduffmore were set up to be sold under the decree in this cause on the 22nd of January 1844, and C. G. O'Callaghan was declared the purchaser. On the 1st of February 1844, he lodged the one-fourth, and on the 21st of February 1844, the remaining three-fourths of his purchase money. The sale was confirmed on the 22nd of February 1844, and the conveyance to the purchaser executed on the 18th of April 1845, and he was put into possession by injunction on the 25th of July 1845.

On the 18th of January 1847 the purchaser moved for the sum of £310 cash in bank to the credit of the cause, lodged by the executor of the late receiver, on account of £333. 14s. 6d. received by the said receiver on foot of rents to which the purchaser was entitled from the 1st of November 1843, when he became entitled to the rents, up to the 25th of July 1845, when he entered into possession; and for a reference to enquire and report the sum which he was entitled to receive out of the rents. An order was made declaring the purchaser entitled to the rents which accrued due on the 1st of May 1844, the gale day subsequent to the lodging of the three-fourths; and that it be referred to the Master to enquire and report what portions of the rents of the said lands, to which the said purchaser was so entitled, had been received by the receiver, and what were the funds properly applicable to pay the same.

The Master made his report on the 3rd of May 1847, whereby he found that by an account of P. Carrick, Esq., the late receiver, filed the 20th of May 1845, there was due for arrears of rent out of the said lands up to and for the 1st of November 1843, £787. 19s. 6½d. That since the passing of the said late account, and since the death of Pierce Carrick, his executor had passed an account of all rent and arrears received by him up to and for the 25th of March and 1st of May 1845, and that the rent and arrears

Rents received by a receiver after the gale day next succeeding the lodging of the three-fourths of the purchase money by a purchaser of lands under a decree, are applicable—first to the payment of solvent arrears, and then to the rent due to the purchaser, whether or not he has gone into possession, or the purchase deed has been executed.

Lee v. Moorhead, 2 Mol. 509, and *Hargrave v. Holland*, 5 Ir. Eq. Rep. 169, overruled.

Practice in framing objections to the Master's report allocating rents so received.

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so received amounted to £483. 18s. 3d. (as by a schedule to the report appeared), the whole of which was applicable to pay the arrears so due up to and for the 1st of November 1843, except the portion next thereafter mentioned; and he found that by said account, of the sums composing the sum of £483. 18s. 3d., there were four, amounting in all to £33. 12s. 6d., which not being applicable to said arrear, were portions of the rent to which the purchaser was entitled: and he further found that the funds in bank to the credit of the causes were properly applicable to pay the purchaser the sum of £33. 12s. 6d.

The schedule to the report set out the yearly rent of each tenant, and the arrears due by each. The four items which made up the sums of £33. 12s. 6d., to which the Master found the purchaser entitled, were gales due on the 1st of May 1844 by four persons, who were the only tenants who had paid up their arrears.

The purchaser took objections to the report, on the ground that the Master ought to have reported that the purchaser was entitled to so much of the said sum of £483. 18s. 3d. as was equal to the amount of three half-years' gales of the rent of the lands from the 1st of November 1843 to the 1st of May 1845, viz., £366. 12s. 11½d.

Argument. Mr. Serjeant Warren and Mr. T. R. Henn, in support of the objections.

Mr. O'Brien contra.

The following authorities were referred to: *Lee v. Moorhead* (a); *Hargrave v. Holland* (b); *Stewart v. Alexander* (c); *Vesey v. Elwood* (d); *Despard v. Head* (e); *Brown v. Dowdall* (f); 1 *Sug. on Vendors*, p. 8; *Foster v. Deacon* (g); *Esdaile v. Stephenson* (h); *Acland v. Gainsford* (i); *Wilson v. Clapham* (k); *Duigenan v. Nangle* (l).

(a) 2 Moll. 509.

(c) 2 Jones, 530.

(e) 1 Hog. 486.

(g) 3 Mad. 394.

(i) 2 Mad. 28.

(b) 5 Ir. Eq. Rep. 169.

(d) 3 Dr. & War. 74.

(f) 2 Hog. 196.

(h) 1 Sim. & St. 122.

(k) 1 J. & W. 36.

(l) 2 Moll. 96.

The MASTER OF THE ROLLS said that before he delivered judgment he should enquire from the four Masters what had been the practice previously to the decision of *Hargrave v. Holland*.

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The following are the queries submitted to the Masters, and their answers:—

A question having been raised in this cause before the MASTER OF THE ROLLS as to a purchaser's right to the rents received by the receiver subsequent to the gale day next after the lodging of the remaining three-fourths of the purchase money, the MASTER OF THE ROLLS is desirous to be informed by the Masters what the practice has been on that subject.

First—Where the receiver receives rents from the tenants of the lands subsequent to the gale day next after the lodging of the remaining three-fourths of the purchase money, has it been the practice for the Masters, upon references to them, to allocate those receipts to the payment of arrears which may have been due by the tenants, according to the course as stated in *Lee v. Moorhead* (a), or have such receipts been allocated in the first instance to pay to the purchaser the rents which became payable after the lodgment of such three-fourths, according to the case of *Hargrave v. Holland* (b)?

The allocation has in general been in accordance with the course stated in *Lee v. Moorhead*.

W. HENN. E. LITTON.

W. BROOKE. J. J. MURPHY.

Secondly—In case the practice of the Masters' offices has been in general according to the rule as laid down in *Lee v. Moorhead*, has any distinction existed between the case of an ordinary arrear; for example, an arrear of one or two gales due at the time the three-fourths of the purchase money has been lodged; and the case where the arrear has been very considerable—for example, where three or four years were in arrear when the three-fourths of the purchase money were lodged?

No distinction existed provided they were solvent arrears.

W. HENN. E. LITTON.

W. BROOKE. J. J. MURPHY.

(a) 2 Moll. 509.

(b) 5 Ir. Eq. Rep. 169.

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Thirdly—What has been the course adopted in allocating rents received by the receiver after the purchaser's deed has been executed and after the purchaser has gone into possession?

The rents were allocated first to the oldest solvent arrears.

W. HENN. E. LITTON.

W. BROOKE. J. J. MURPHY.

Fourthly—A general statement of rule acted on by the Masters on references as to the portion of the rents received by the receiver subsequent to the lodging of three-fourths of the purchase money.

24th June 1847; Four Courts.

SIR—In reply to the accompanying queries relative to the mode of allocating rents received by the receiver during the time the purchaser not being in possession was nevertheless entitled to the rents, we beg to state that according to our recollection the practice of the Masters previously and up to the time of pronouncing the decision in the case of *Hargrave v. Holland*, had been to apply the rents so received first in liquidation of the oldest arrears that were deemed solvent arrears, such as the Master would have considered the receiver was bound to enforce, unless the parties themselves relying on the solvency of the tenants assented to a different mode of allocation. If the parties had not so agreed, or the arrears were not treated as insolvent, we do not recollect any case prior to the decision in *Hargrave v. Holland* in which the rents were not allocated first in discharge of the arrears. No rest was made at the time the purchaser became entitled, nor was it considered that the execution of the purchase deed, or the purchaser having gone into possession made any difference; and that case at the time it was decided was certainly considered by all the then Masters as at variance with the previous practice.

We are, Sir, your obedient servants,

W. HENN. E. LITTON.

W. BROOKE. J. J. MURPHY.

June 24.
Judgment.

The MASTER OF THE ROLLS.

A reference was made to the Master in this cause, to enquire and

report what portion of the rents of the lands which accrued due on the 1st of May 1844 had been received by the receiver, and it was declared that the purchaser was entitled to them. The remaining three-fourths of the purchase money had been lodged, and the sale confirmed in February 1844. The question which arose on the report under this order of reference was, whether the Master was right in allocating the rents received by the receiver subsequently to May 1844 (which was the first gale which the purchaser was entitled to) in payment of the arrears due by the tenants on the 1st of November 1843? According to the case of *Hargrave v. Holland*, he was not justified in adopting that course, but the purchaser was entitled to all rents received by the receiver after the 1st of May 1844, being the gale day following the lodgment of the three-fourths of his purchase money. The question is, whether I am to act on that decision. I thought that the best course I could adopt on so important a question was to enquire from the Masters the practice previously to the decision of *Hargrave v. Holland*. I accordingly put four questions to them, the answers to which I have received.—[His Lordship read the queries and the answers and observations of the Masters.]

From the time when the case of *Hargrave v. Holland* was first mentioned to me, I entertained and expressed great doubts as to the soundness of the decision. The effect of the decision of the late Master of the Rolls in that case would be, that if the purchaser lodged the purchase money on the 24th of March, and thereby became entitled to the gale due on the 25th of March, and the September gale was paid on the 26th of March, the receiver would be bound to allocate it, not to the September gale, but the gale due the day before. On the other hand the case of *Lee v. Moorhead* went too far the other way; for according to that decision the receiver was bound to apply rents received after the rents to which the purchaser was entitled had become payable to the payment even of insolvent arrears. The rule laid down by the Masters appears much more reasonable than that laid down in either of those cases. It is, that rents received by the receiver should be applicable to what may be called solvent arrears. But although that rule appears

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to be just, there will, no doubt, be some difficulty in carrying it out in particular cases.

The objections taken to the Master's report in this case are all founded on the case of *Hargrave v. Holland*, and in strictness therefore they are not sustainable. But it would not be reasonable to hold the purchaser strictly to the form of his objections, as they were taken on the authority of a published decision of this Court. The best course will be to refer the case back to the Master, in order that the purchaser may take objections that the arrear in the case of each particular tenant is not a solvent arrear, if he has grounds for doing so. There are several of the tenants named in the schedule to the Master's report, whose arrears could not perhaps be considered as solvent arrears if the Master's attention had been called to them, or the objections properly framed to raise that question.

In future the proper course will be to object to the arrears of particular tenants as not solvent arrears.

The parties so consenting, the following order was made:—

Order.

Overrule the objections ; and let both parties abide their own costs of this motion and of said reference, and let the deposit be paid back ; and declare the purchaser entitled to the sum of £200 out of the funds received by the receiver, and now in the Bank of Ireland standing to the credit of this cause, the parties so consenting : and accordingly, let the Accountant-General draw on the Governor and Company of the said bank in favour of the said C. G. O'Callaghan for the said sum of £200 ; and let the plaintiff's costs be costs in the cause.

Rolls Motion Book, 253, fol. 83, 1847.

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ALLEN v. JERVOISE.

Nov. 22.

ON the 4th of June 1847 an order was made by the MASTER OF THE ROLLS that Anne Barber, acting executrix of Osborne Edward Barber, solicitor, deceased, do hand over to Francis Allen the plaintiff's solicitor a certain deed of the 9th of March 1802, unless in ten days after service of the order good cause should be shown to the contrary.

This Court has not jurisdiction to order the personal representatives of a deceased solicitor to deliver up title deeds on which they claim a lien.

The affidavit of Anne Barber stated that the said deed was found among O. E. Barber's papers; that he had been the land agent of William Fenton a defendant in the cause for many years previous, and up to the time of the death of the said W. Fenton, and that she had heard and believed that the said deed with other papers had been handed by W. Fenton to O. E. Barber as his law agent; that she claimed a lien for costs on the deed, and that if the order was made absolute she would lose the costs.

Statement.

Mr. Chatterton, for Anne Barber, showed cause against the conditional order, contending that the Court had no jurisdiction to make a summary order against the executrix of a solicitor for delivery of the deed: *Tidd's Practice*, p. 325; *Anonymous* (a); *Maddeford v. Austwick* (b); *Doe v. Sabin* (c); *In re Cole* (d).

Argument.

Mr. Reeves, in support of the conditional order, cited *Redfearn v. Sowerby* (e).

THE MASTER OF THE ROLLS.

In *Williams v. Griffith* (f) Lord Abinger says, "I think this

Judgment.

(a) 2 Ves. sen. 451.

(b) 3 M. & Cr. 423.

(c) 8 Dow. Pr. C. 468.

(d) 2 Sim. & St. 463.

(e) 1 Swanst. 84; S. C. Wilson's Ch. Rep. 95.

(f) 10 M. & W. 125.

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rule must be discharged. We are called upon to carry the principle a step farther than it has hitherto gone, by subjecting a party who is not an attorney to the summary jurisdiction of the Court." That case is in accordance with *Maddeford v. Austwick*, and on the authority of those cases I shall allow the cause without costs.*

* See *Turkington v. Kiernan*, ante, vol. 9, p. 479.

ANONYMOUS.

Nov. 3.

Where a defendant is served with subpoena in Ireland the Court has no jurisdiction to make an order that a parliamentary appearance be entered for an adult defendant, or that the Clerk in Court should be appointed to appear and answer for a minor defendant after the fourteen days specified in the 33rd Rule have expired, the side-bar order not having been entered within such fourteen days.

MR. NEWTON moved that one of the Clerks in Court might be appointed guardian to appear and answer for the defendant —, a minor, under the 33rd Rule. More than fourteen days had elapsed since service of the subpoena.

The MASTER OF THE ROLLS.

By the 4 & 5 W. 4, c. 78, s. 1, it is enacted, "That where any defendant to any suit shall be duly served in Ireland with process of subpoena to appear and answer in such suit, and shall refuse or neglect to appear thereto, an appearance shall and may, after the expiration of eight days, exclusive of Sundays and holydays, from the due service of such subpoena, be entered for such defendant at the instance of the plaintiff *in such manner and form as the Court by any General Order or Orders* to be made in pursuance of this Act shall direct." The 33rd Rule, which was made in pursuance of the Act, directs, "That if a defendant is served in Ireland with a subpoena to appear within the time thereby limited, the plaintiff, upon affidavit of such service, shall be at liberty at any time within fourteen days, *but not after*, to enter a side-bar rule that a solicitor, to be named therein, be appointed to appear for such defendant (not being an infant), or that one of the Clerks in Court be appointed guardian to appear and answer for a defendant, being an infant."

The Rule is founded on the 1st section of the Act, and the side-bar rule to appoint a parliamentary solicitor for the defendant, or, being a minor, to appoint one of the Clerks in Court as guardian to appear and answer, must be entered within the fourteen days "and not after." I have made enquiry from Mr. Darley as to the course of practice under the 33rd General Order of 1843, and the corresponding Order of the year 1834, and I have been informed that it has been held that the Court has no jurisdiction to order the side-bar rule to be entered after the fourteen days.

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No rule (a).

(a) See *Tenpenny v. Taylor*, 3 Law Rec. N. S. 283.

EGAN v. NOLAN.

MR. CHARLES KELLY, for the plaintiff, moved for liberty to amend the appearance in this cause by making same the appearances of defendants Thomas Nolan a minor, and Edmond John Nolan a minor, and by making same by one of the Clerks in Court. The side-bar rules and parliamentary appearances had been entered for the minors within the fourteen days specified by the 33rd General Rule.

Nov. 3.
Parliamentary appearances having been entered for minors within the fourteen days specified by the 33rd Rule, the Court amended the side-bar rules and appearances after the fourteen days had elapsed.

The MASTER OF THE ROLLS.

In the case which was moved before me this morning the plaintiff had allowed the fourteen days to elapse without taking any proceedings, and I had no jurisdiction to make the order. But this case is different; here the plaintiff has taken a step within the time, but has made a mistake. I shall make the order in this case to amend the side-bar orders and appearances.

Judgment.

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FLATTERY v. ANDERDON.

Nov. 8.

The plaintiff, an executrix, being also devisee and legatee, the Court made an order that she might sue *in forma pauperis*.

THE bill in this cause was filed for the purpose of carrying the trusts of a will into execution. The plaintiff was executrix, but was also devisee and legatee under the will. The documents required by the General Order were produced.

Argument.

Mr. *Molyneux* moved that the plaintiff might be permitted to sue *in forma pauperis*. He cited *Thompson v. Thompson* (a).

Mr. *Hamilton Smythe*, contra, relied on *Oldfield v. Cobbett* (b).

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Judgment.

As a general rule, neither an executor nor administrator can sue *in forma pauperis*, the privilege only extending to persons suing in their own rights. Mr. *Beames*, however, in his work on *Costs*, 2nd ed., p. 79, states the case of *Thompson v. Thompson* from his own manuscript. In that case the administratrix had been admitted to sue *in forma pauperis*; but she was beneficially entitled to a portion of the fund claimed as the widow of the intestate; and Lord Eldon refused to dispauper her, holding that to the extent of her beneficial interest she was virtually suing in her own right, and therefore not within the rule laid down in *Paradise v. Sheppard* (c). Mr. *Beames* states that the same distinction was afterwards acted upon by Lord Cottenham, when Master of the Rolls, in the case of *Perrott v. Britten*. I must therefore make the order.

(a) Turn. & Ven. 513.

(b) 1 Phil. 613.

(c) 1 Dick. 136.

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HEENAN v. BERRY.

Nov. 16.

THE petition stated that by a deed of the 6th of January 1829, after reciting that certain estates therein mentioned were subject to certain charges, and that John Berry had agreed to vest the said estates in trust for the parties therein mentioned, and that John Berry and the Rev. William Parsons had applied to the petitioner to become the manager of said estates, and thereout to pay the incumbrances so far as funds should come to the petitioner's hands, and that inasmuch as the petitioner was tenant to part of the lands it was deemed advisable that the same should be vested in Robert Worthington as trustee, the estates were conveyed to Robert Worthington in trust to permit the petitioner to receive the rents and to apply the same in discharge of such incumbrances affecting the same, and the interest thereof; and in trust in case the petitioner should deem it expedient to advance any sum for the discharge or liquidation of any of the debts of the said John Berry, or to lend him any money for his maintenance, support or advancement in life not exceeding £1800, to permit the petitioner to stand in place of such creditor or creditors as the petitioner should so pay, and repay himself such advances and interest thereon, and to stand seised of said lands and premises until such incumbrances, &c., should be fully paid; and if necessary, to sell the lands or part thereof and to pay off the charges, incumbrances and advances.

The Court is not bound to make an order under the 102nd Rule in favour of a puisne incumbrancer. Therefore, where a petition was presented by a party, the consideration of whose security was impeached by affidavit, the Court made no rule on the petition, without prejudice to petitioner filing a bill.

Statement.

The petition then stated a mortgage of the 24th of August 1830, by John Berry to Lord Oxmantown for £2000 in trust for the petitioner; that he entered into the lands in execution of the trusts of the deed of the 6th of January 1829, and that there was due to him a large sum for principal and interest on foot of advances made by him to the said John Berry, pursuant to the provisions of the deed, over the sum secured by the mortgage. That the bill was filed in November 1839 against John Berry and Robert Wetherall, pray-

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ing an account of the sum due on foot of two mortgages of the 15th of June 1802, and the 28th of July 1827; an account of all charges affecting the lands, and foreclosure and sale. That in February 1841, a decree was pronounced to take an account of all debts, charges and incumbrances affecting the mortgaged lands prior to and contemporaneous with the mortgage of the 28th of July 1827.

The petition then stated that the petitioner had filed a charge under the decree, which was disallowed by the Master as on foot of a debt subsequent to July 1827. That a decree for a sale was pronounced in April 1845, and that the lands were sold, except the lands of Chesterfield; that the funds produced by the sale were allocated among the reported creditors, and that after payment of all charges which had been proved, there would remain a sum of about £900 to the credit of the cause, which was applicable to the payment of the petitioner's demand; and that the lands of Chesterfield had not been sold.

The petition prayed that, pursuant to the 102nd General Rule, it might be referred to the Master to take an account of the sum due to the petitioner on foot of his claims under the deeds of the 6th of January 1829, and 24th of August 1830, and also an account of charges affecting the surplus to the credit of the cause, and of charges affecting the unsold lands of Chesterfield, and to cause advertisements to be published, &c., and that the Master should proceed to sell the lands remaining unsold, and that the produce of such sale, with the surplus in Court, might be applied so far as it would extend to the payment of the sums which might be reported due on foot of the charges affecting the said lands, according to their priorities, and the costs; and pending the said enquiries that the receiver might be extended to the unsold lands, and be at liberty to set said lands according to the course of the Court.

An affidavit was made and accounts were produced impeaching the consideration of the mortgage of August 1830, and tending to show that the petitioner claimed a much larger sum than was really due to him.

Argument.

Mr. *Butt* and Mr. *W. Smith*, in support of the petition.
 Mr. *Rogers*, contra.

The MASTER OF THE ROLLS.

The object of the 102nd General Order is to prevent the accumulation of costs. Under the practice previously to the Rules of 1843, the Court, on a bill filed by an incumbrancer, directed an account of incumbrances prior to and contemporaneous with the plaintiff's demand. The practice in the Exchequer was, to direct an account of all incumbrances prior to and contemporaneous with the demand of the last specified incumbrancer who was a party to the suit. But in this Court the account was of incumbrances prior to and contemporaneous with the plaintiff's demand. Now, under the 102nd Rule the decree directs an account of all debts subsequent as well as prior and contemporaneous to the plaintiff's, and if there be a surplus after payment of his demand the Court may order the Master to make a supplemental report allocating the surplus among the subsequent incumbrancers. The effect of this practice is to save expense. The latter part of the Rule was intended to apply to decrees then already made, which did not direct an account of all incumbrances. The words of the Rule are "And the Court may accordingly direct such sale, if it shall be of opinion that such creditors, or any of them, would be entitled to have their demands raised by a sale of such lands or property; or may direct a receiver to be appointed or continued over such unsold land or property for the benefit of such subsequent creditors, and distribute the funds to be received by such receiver accordingly." There is nothing in the Rule to make it imperative on the Court to grant the order.

In an ordinary case I should not pay attention to a mere allegation impeaching the consideration of a mortgage or judgment; but in this case the deed is between a principal and agent, and a strong case of impeachment has been made out, and accounts have been handed up to me tending to show that full consideration was not given for the deed. Under such circumstances I think I ought not to make a summary order without giving the defendant an opportunity of defending himself against the claim. I shall therefore make no rule on the petition, without prejudice to the petitioner filing a bill for recovery of his demand.

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ANDERSON and others v. DOWLING and another.

Nov. 22, 24.

A bill of discovery in aid of a defence at law will not lie against one who is not a party to the record at law.

If a bill prays relief and discovery, the plaintiff cannot waive the relief, and insist on the discovery.

A bill by the directors of an Insurance Company stated matters which amounted to a legal defence, and prayed a discovery of said matters, that a policy of assurance might be delivered up to be cancelled, and an injunction to stay an action at law brought on it. The bill was against A, the administratrix of the assured, and B, the assignee of the policy, in concert with whom, and by whose directions the bill charged the policy to have been effected, but who was not a party to the action. The Court refused the injunction on the bill as a bill of relief, because it stated facts amounting to a defence at law, or as a bill of discovery, because it prayed relief which the plaintiff could not waive.

THE bill stated that the plaintiffs were the directors of an association called "The United Kingdom Life Assurance Company." That on the 17th of June 1846, Patrick Fitzgerald, since deceased, applied to the agent of the Company in Limerick to effect an insurance on his life for the sum of £450. That on the occasion of the said application he signed a proposal for an insurance, which contained a list of several printed questions, being those usually addressed by the Company or their agents to parties seeking to effect insurances upon their lives, and that to each of the said questions was annexed the answer thereto of the said Patrick Fitzgerald; and that the proposal contained, among others, the following questions and answers thereto:—"Age next birth-day?" annexed to which was written the answer of Patrick Fitzgerald, "Fifty-two years next birth-day." "Is the party afflicted with any habitual cough or any disease of the lungs, or any disease or disorder tending to shorten life?"—Answer, "No." "Has the party a sound and good constitution, and is he now in a good state of health?"—Answer, "He is." "Name and residence of the person's usual medical attendant to be referred to for information as to the present and general state of health and habits of the party, and how long has he known him?"—Answer, "Had no occasion for medical advice since 1822, when the late Doctor Elliot attended me for fever." "Has the party consulted or been attended by any other physician, surgeon or apothecary during the last three years, and what is or are their or his name or names, and what was the cause of such consulting or attendance?"—Answer, "No." "Name of an intimate friend to be referred to who can give correct and full information as to the present

and general state of health and habits of the party, and how long he has known him?—Answer, “Mr. James M'Mahon of Kilrush, and Mr. Thomas Chambers of Kilrush.” “Is there any other circumstance or information touching the past or present state of health or habits of life of the party whose life is proposed to be assured, with which the directors ought to be made acquainted?”—Answer, “I do not know of any.” “Did any of the party's near relations die of consumption or other pulmonary complaint?”—Answer, “No.” “Has the party's life been accepted or refused at any other office? and if accepted, was it at the usual premiums, or with what additions?”—Answer, “No.”

The bill then stated that the said proposal contained an agreement that the particulars mentioned in the said proposal, or which should be stated by the referees therein mentioned, should form the basis of the contract between the assured and the Company, and that if there should be any fraudulent concealment or untrue allegation contained therein, or any circumstance material to the said assurance should not have been fully communicated to the said Company, or there should be any fraud or mis-statement, all money which should have been paid on account of the said insurance should become forfeited and the policy void. That the questions had been read out and proposed to Patrick Fitzgerald by the Company's agent, and that he made the foregoing answers.

The bill then stated the answer of one of the referees to the application by the agent of the Company. That Patrick Fitzgerald had been examined by their medical officer, and it set forth certain questions put by the latter, and the answers thereto, which were written down at the time and signed by the medical officer and by P. Fitzgerald. That the answers of Fitzgerald in the medical report and proposal were false and untrue, and were made by him under the directions of the defendant Jeremiah Dowling, with whom they had been preconcerted for the purpose of defrauding the plaintiffs. That Fitzgerald, acting in concert with and under the directions of the defendant Dowling, falsely and fraudulently represented, contrary to the truth and fact, to the Company's agent, that his sole object in effecting the insurance was to make a pro-

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vision for his family on his death. That the Company were induced by such proposal and representations to permit an insurance to be effected, and a policy was signed and under-written by the plaintiffs as directors. That the premium upon the policy and all other costs and charges incident thereto were paid out of the moneys of Dowling. That Fitzgerald previously to and at the time of making the proposal and signing the policy had a strong tendency to consumption; that his sisters and several other near relations had died of consumption; that he was much beyond the age of fifty-two, and had received an injury from a fall. That Dowling had induced him as his agent and for his benefit to apply to several other Assurance Companies which were stated in the bill, with some of which he had effected insurances at increased premiums, and by others had been refused. The bill then stated that the policy effected with the plaintiffs was assigned to Dowling on the 27th of August 1846, and notice of the assignment given by Dowling to the Company in September 1846. That Fitzgerald died on the 6th of December 1846, and administration had been granted to the defendant Anne Fitzgerald. That the death of P. Fitzgerald was occasioned or hastened by consumption.

The bill further stated applications by Dowling for the amount of the policy, and that Anne Fitzgerald by his direction had commenced an action against the Company, and threatened to proceed to judgment, well knowing that the plaintiffs were not able to make a good defence at law without a discovery of the several aforesaid matters, and prayed a discovery of the said matters; that the defendants might bring into Court the policy and deed of assignment; that they might be declared fraudulent and void, and might be delivered up to be cancelled; and an injunction to stay the action at law.

Argument. Mr. Brewster and Mr. F. W. Darley, for the plaintiffs, moved for an injunction.

They contended that the circumstances stated in the bill entitled them to relief, on the ground of fraud; but if not to relief, at all events to discovery in aid of the defence at law; and in either view the plaintiffs were entitled to an injunction. They cited *Fenn v.*

Craig (a); *Barker v. Walters (b)*; 1 *Van Heyth. Eq. Pl.* p. 443;
Kerr v. Rew (c); *Irving v. Thompson (d)*.

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Mr. *J. D. Fitzgerald* and Mr. *Mills*, for the defendants, argued that the facts stated in the bill amounted to a good defence at law; and that the bill praying relief could not be treated as a mere bill of discovery: *Houlditch v. Nias (e)*; *Jones v. Lane (f)*; *Threlfall v. Lunt (g)*; *Hodgson v. Murray (h)*; *Desborough v. Crulewis (i)*.

THE MASTER OF THE ROLLS.

Nov. 24.
Judgment.

An application was made in this case on the part of the plaintiff for an injunction against Anne Fitzgerald and Jeremiah Dowling, to stay proceedings in an action at law brought by Anne Fitzgerald as personal representative of her husband Patrick Fitzgerald, on a policy of insurance effected by him with the United Kingdom Insurance Company. The Counsel for the Company decline to give judgment at law.

The facts of the case are these:—Patrick Fitzgerald applied to effect an insurance with this Company, and as the basis of the contract the Company required him to answer certain queries and to sign a certain declaration which are stated in the bill. Among the queries was the following:—"Has the party's life been accepted or refused at any other office? and if accepted, was it at the usual premiums or with what addition?" That was answered, as I understand, in the negative. There were other queries as to his state of health, and whether he was afflicted with any disease or disorder tending to shorten life? which were also answered in the negative. There are statements in the bill to show that the insurance, although effected in the name of Patrick Fitzgerald, was in fact for the benefit of the defendant Jeremiah Dowling, and was fraudulent.

(a) 3 Y. & C. Exch. 216.

(b) 8 Beav. 92.

(c) 5 M. & Cr. 165.

(d) 9 Sim. 29.

(e) 8 Price, 689.

(f) 3 Y. & Col. Ex. 281.

(g) 7 Sim. 627.

(h) 3 Sim. 283.

(i) 3 Y. & Col. Ex. 175.

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Judgment.

It is settled, and I think on a sound principle, that if an instrument is invalid or illegal, and the invalidity or illegality is apparent on the face of the instrument itself, a bill in equity will not lie, because lapse of time or the death of witnesses would not impose difficulty on the party liable, or deprive him of the means of defence (a). But wherever the illegality or invalidity arises from matter *dehors* the instrument, a Court of Equity will in general entertain a suit for the delivery up of the instrument. On this principle, when a fraudulent policy has been executed, an Insurance Company may file a bill before the death of the assured in order to have it delivered up to be cancelled, and a bill might, under particular circumstances, be filed after the death of the assured. But admitting that, I cannot see the bearing of the authorities which have been cited on this motion. The question which I have to decide is not whether the bill can be sustained, but whether I should grant an injunction to stay the proceedings at law. The facts stated in the bill amount to a clear defence at law, and if proved would entitle the Company to a verdict. The document referred to by the bill was the basis of the contract, and was referred to by the policy. If Patrick Fitzgerald, at the time the insurance was effected, was subject to any disorder tending to shorten life, his statement that he was not amounted to a breach of warranty; so also did his statement that he had not applied to any other Company to effect an insurance, if the statement was false. Besides, if there was no warranty, the omission to communicate a material fact would, according to *Lindenau v. Desborough* (b), entitle the Company to a verdict. The plaintiffs ask me to grant an injunction to stay the proceedings at law, not on the ordinary ground, that they have no defence at law, but because they have a clear defence at law if the statements in the bill are true. The concurrent jurisdiction of this Court to order a deed to be delivered up to be cancelled, where the defect arises from something *dehors* the deed, does not authorise the Court to grant an injunction to prevent the trial of a legal question in a Court of Law.

(a) See the cases referred to in *Heath v. Heath*, ante, vol. 9, p. 637.

(b) 8 B. & Cr. 586.

In this case I am asked to grant an injunction to stay an action at law, in which the validity of this policy may be immediately investigated. For these reasons I am of opinion that, considering this bill as a bill for relief, I should not be justified in granting an injunction, and thus prevent the trial of the legal question stated in the bill.

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Judgment.

Then can I treat this as a bill of discovery and grant an injunction until answer? So far as Jeremiah Dowling is concerned, as he is the person for whose benefit it is alleged that this policy was effected in the name of Patrick Fitzgerald, it is plain on authority that this is not a bill of discovery. A bill of discovery cannot be filed against a person who is not a party to the record at law. In *Kerr v. Rew (a)*, Lord Cottenham stated that the only apparent exception to this rule was in the case of an ejectment; but that he had communicated with the Judges, and it turned out that an ejectment was not an exception, because the landlord is considered a party to the record at law. It is against him that the bill for redemption is filed. Dowling is not a party to the record at law, therefore I cannot treat this as a bill of discovery as to him. As to the defendant Anne Fitzgerald, who is the plaintiff at law, the plaintiffs in this suit might have filed a bill of discovery against her and obtained an injunction until answer; but the plaintiffs, after inserting in their bill a prayer for relief, cannot treat this as a bill of discovery. The authorities are clear on this point.

The first case is the case of *Ambury v. Jones (b)*. There was a demurrer in that case to a bill of discovery, on the ground that in the prayer of process the bill prayed that the defendant might abide such order and decree as the Court should think proper. Alexander, C. B., said:—"If it be a rule, which I understand it to be, that the application for costs may be made within a reasonable time after filing the answer, where the bill prays only discovery, the cause is brought to a very short point. But if the plaintiff, though seeking merely a discovery, was able by means of the prayer of process to turn the bill into a bill for relief, it

(a) 5 M. & Cr. 164.

(b) 1 Yo. 200.

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would impose on the Court the necessity of enquiring in all cases whether in fact any title to relief exists. It is more convenient as a rule of practice that the plaintiff should stand or fall by his own statement. I have no disposition to alter the practice, which is, when a person by his bill prays relief it shall be taken as a bill for relief, and it shall not be competent for him to turn a bill for relief into a bill for discovery." The demurrer was allowed.

The same principle was decided in two cases in 6 *Simons—Angell v. Westcombe* (a), and *James v. Herriot* (b). In *Angell v. Westcombe*, the Vice-Chancellor says:—"It ought to appear very distinctly whether the bill is for relief or for discovery only; for if that matter is left in doubt the defendant may put in his answer, and then the plaintiff must amend his bill. The general opinion of the Profession was against the decision in *Brandon v. Sands*" (c).

In the case of *James v. Herriot* the same principle is laid down. It was decided that a bill of discovery is demurrable, if the words "stand to and abide such order and decree therein" are inserted in the prayer of process. *Cholmondely v. Clinton* (d) is to the same effect. On these authorities I think I cannot treat this bill as a bill of discovery, and grant an injunction until the defendants shall have answered the bill.

In *Desborough v. Crulewis* (e) it was decided that if a prayer for relief be added to the ordinary prayer in a bill of discovery, in aid of a defence at law, the defendant is not bound to give any further discovery than the relief sought in the bill requires.

I am of opinion, therefore, that looking at this bill as a bill for relief, I cannot grant the plaintiff an injunction, because the bill states facts which if proved amount to a perfect defence at law; and that as the bill contains a prayer for relief, the plaintiff is not at liberty to waive the relief and obtain an injunction as on a bill of discovery.

(a) 6 Sim. 30.

(b) 6 Sim. 428.

(c) 2 Ves. jun. 514.

(d) 2 Ves. & B. 115.

(e) 3 Y. & Col. Ex. 175.

1847.
Chancery.

SPUNNER v. WALSH.

● (Chancery.)

July 1, 2.

THIS case came before the Court on exceptions to the Master's report of good title. The Master of the Rolls had allowed two of the exceptions, and overruled the rest, and from his decision the parties appealed. The facts of the case are fully stated in the report of the case at the Rolls, *ante*, vol. 10, p. 386.

Mr. Christian and Mr. Thomas Lefroy, for the plaintiff.

Mr. Hughes and Mr. Norman, for the purchaser.

The questions on which alone the judgment of the Court depended arose on the second, fourteenth and fifteenth exceptions. On these it was contended for the plaintiff that the purchaser, having notice of the lease from Lord Fitzwilliam, had notice of all its contents, and that no objection therefore could be made on the burdensome nature of the covenant; that the past breaches of the covenant by the exercise of the prohibited trades were clearly waived by the landlord; that the objection that the value of the purchase would be deteriorated if the same trades were not continued was only a ground for compensation at most, and not an objection to the title; that the purchaser having gone into possession was now precluded from taking this objection, as he must be considered to have accepted the premises in the state in which he took possession of them; and that having brought forward and relied on several other grounds of objection, which were all overruled before this was made, he being in possession of the property, the Master should not have allowed him to begin anew with this

A purchaser of a leasehold under a decree is affected with notice of all clauses in the lease; but he has a right to assume that the premises are lawfully in the condition in which they are sold; and therefore when a lease contained a clause of forfeiture for the exercise of a trade, which was that carried on on a part of the premises comparatively of little value for any other business; *Held*, a ground for discharging the purchaser, though he had been sometime in possession, and there was a waiver by the landlord for the time past.

A purchaser under a decree is not bound to make his objections to the title in any particular order.

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at the close of the enquiry. The topics urged and the authorities cited were generally similar to those which were used at the Rolls.

The following additional authorities were also referred to:—
Arnsby v. Woodward (a); *Denton v. Richmond* (b); *Nouaille v. Flight* (c); *Harwood v. Bland* (d); *Lesturgeon v. Martin* (e).

THE LORD CHANCELLOR.

July 1.
Judgment.

It might have been a question if the parties were entitled to a reference at all in this case. Many cases have arisen in England where the party having gone into possession, as in *Burnell v. Brown* (f), has precluded himself from making the objection; for the Court says you have gone into possession and waived your right. Here, however, the party has got the order of reference, and that order has been acquiesced in by the plaintiff, who will be now held to it.

I am not aware of any rule to prevent a party making all the objections which he can raise; he is not bound to make them in any particular order. A new reference might be sought, but when a general reference is gone into, it would be difficult to say that the Master was at liberty to decline to entertain any particular ground of objection, not because the party had waived that ground, but because he had not brought it forward in a particular order of time.

As to the effect of the notice of this defect appearing on the title, it is a different question. The question is, whether the purchaser is not to be considered as buying whatever he had notice of? and whether the Master is not to consider the purchase as made subject to that? and therefore all the arguments which go to show that the purchaser had constructive notice are open and available to the plaintiff on those objections. On that part of the case I am bound to follow the authorities followed by the Master of the Rolls, and to hold that the purchaser had constructive notice. He knew of the

(a) 6 B. & C. 519.

(c) 7 Beav. 521.

(e) 3 My. & Kee. 255.

(b) 3 Tyr. 630.

(d) Fl. & Kel. 540.

(f) 1 Ja. & Wal. 168.

lease from Lord Fitzwilliam by its having been referred to, and he might have required it to be shown to him, and had a right to see it before he made his purchase. There was nothing to show that the lease might not have contained unusual covenants, and the purchaser could have called on the vendor's solicitor to show it to him. I quite concur therefore with the Master of the Rolls that the purchaser cannot now object to the title because there are those particular covenants in the lease from Lord Fitzwilliam.

But the state in which the premises are occupied is a different thing. The purchaser sees the premises in a certain condition and the vendor offers to sell them in that condition; he thereby implies and holds out to the purchaser that they are lawfully in that condition. They are described in the rental under which they are put up to sale as a dwelling-house at a certain rent in the possession of Rogers. That is true enough, they are set at the rent mentioned; but the purchaser says that if their present state be altered and they are restored to the condition which legally they should be in, they will no longer be worth that rent. On the evidence before me, that rent would not be secured if the premises are not continued in the condition in which they are at present. If there were any doubt on this point I would grant an enquiry, or if it were alleged that supposing these trades were stopped by injunction the same rent could still be obtained for the premises; but that is not pretended. The property is subject to a heavy rent and outgoings amounting to more than two-thirds of its value; and every one knows that, in purchasing a property of this description, the rate of purchase depends more on the proportion the rental and outgoings bear to the gross value than on the actual profit.

Now, looking to this view of the case, there is a profit rent of £39, of which £31 is actually in a state of peril by disturbing the condition of the premises as at present occupied by the tenant. I should not think much of this disturbance if the Court could turn this man out of possession, and the premises would be as valuable whether the new occupant were to use them in the same or a different trade. My impression is, that if this were so, and if the Court were in the position to offer the premises to the purchaser as being

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 ———
Judgment.

worth the same rent as they were stated to be, after an eviction, the tenant should be evicted. This is all the purchaser could insist on. The waiver of the past breaches by the landlord is very clearly established, and if his waiver could be obtained up to the last moment, all the breaches previous to that would of course be of no consequence. But still the purchaser would have the right to say to the vendor "you must hand over this property to me in the condition in which by law it ought to be; and I am not to be put to the alternative of evicting the tenant or taking the property subject to future breaches for which I may be evicted." The Master of the Rolls acted on the same view of the case, namely, that the Court cannot give to the purchaser a property of the same value or producing the same amount of rent as was contracted to be sold, after the title to the premises shall be made secure. The purchaser was justified in assuming that the premises were lawfully in the condition in which he saw them; but as it turns out that this is not the case, the Court was bound to restore the premises to their lawful condition, and hand them over so to the purchaser. If, however, this cannot be done without making the premises worthless, I think it forms a good objection to the title, and is not matter for compensation. It is not like giving the premises to the purchaser diminished in value; that would be a case for compensation; but that principle would as justly apply where two-thirds of the entire value of a property of this description is thus subject to be lost by eviction. Perhaps it would be better to set up the premises to be sold again than to direct an enquiry as to the amount of compensation, even if it were a case for compensation. The difficulty I feel is how to appreciate the amount of the loss in value which a change in the nature of the occupation of these premises might cause. I see no way to do this; and if it cannot be done the purchaser is entitled to be discharged.

There has been considerable delay in this case; but I do not think upon the whole the purchaser is bound to take the title, nor do I think he has waived his right to make these objections so as to warrant this Court in holding him to his purchase. I do not think this like the cases where a purchaser is bound by going into

possession and leaving an objection to the title unnoticed for a long time. That applies to matters of objection which the purchaser might know at once; but such could not be the case here. Therefore I am of opinion there has been no waiver of any objection by the purchaser, and I cannot say that he has put forward one objection and held over another, so as to disentitle him from relying on the latter. I cannot carry the doctrine so far as to say, that because one particular objection has not been made in the first instance, the purchaser is precluded from making it afterwards. He is not bound to begin with any particular objection and then proceed to another in any particular order. I have called for and looked at the abstract of title to see how far the purchaser might have been warned by it of this objection. It turns out that the abstract does not state any thing whatever about the tenants, and purports to relate to several lots besides this, and no distinction is made between them.

Upon the whole of the case my impression is in favour of the objections. I think the ruling of the Master of the Rolls was right, and that the purchaser is entitled to be discharged from his purchase. I shall therefore affirm the decision of the Master of the Rolls upon these exceptions. As to the costs, by the general rule of the Court the purchaser should have them. The only question is, whether his delay has deprived him of his right to them? He must pay the costs of such of the objections as have been overruled, but I shall give him the costs of those which have been decided in his favour.

I cannot let the plaintiff have both the interest of the purchase money and the rent; therefore as he keeps the rent, the purchaser is entitled to interest on his purchase money.

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1848.
Chancery.

SWIFT v. M'TIERNAN.

Oct. 23.

The Poor-law valuation is evidence, as a public document, of the value of land comprised in it.

A document not in issue by the bill, and a motion for the introduction of which by amendment has been refused, cannot be used at the hearing.

Argument.

THIS was a suit to set aside an arrangement by way of compromise between the plaintiff and defendant, to whom he had made a lease. Undervalue was one of the grounds relied on. On this part of the case a compared extract from the Poor-law valuation of the Union in which the lands were situated was offered in evidence by the plaintiff.

The *Attorney-General* and Mr. *Fitzgibbon*, for the defendant, objected to its admissibility, arguing that the valuator himself should have been examined, and that to make it evidence it would be at all events necessary to prove that the defendant had submitted to and acquiesced in it, which was not done. It was also not put in issue in the bill.

Mr. *Hughes*, Mr. *Christian* and Mr. *Deasy*, for the plaintiff, urged its admissibility, as a copy of a public document made under the authority of an Act of Parliament, and cited *Welland v. Middleton* (a), where the very point was decided by Sir Edward Sugden.

THE LORD CHANCELLOR.

Judgment.

It appears to me that the Poor-law valuation is not more proper to be received as evidence in this way than the ordnance survey, which has been held not to be evidence. However, I find, on reference to the Registrar's book, that in the case referred to, *Welland v. Middleton*, Sir Edward Sugden admitted the same sort of evidence. I will admit it. Its weight is another consideration.

An affidavit was tendered in evidence, which had been made by the defendant in an action of ejectment formerly pending between

(a) Reported *post*, p. 603.

him and the plaintiff. It was not put in issue by the bill. After the answer, a motion had been made by the plaintiff to amend the bill by putting it in issue, which was refused, on the ground that it was made too late.

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The *Attorney-General* and Mr. *Fitzgibbon* objected to the affidavit being read.

Argument.

Mr. *Christian* and Mr. *Deasy*, contra.

THE LORD CHANCELLOR.

The rule respecting the admission of documents as evidence of facts, though the documents themselves are not specifically put in issue, is very vague, and it is hard to say what are its limits. But I will not receive this document; for, whatever might have been the case if the motion had not been made, I look upon that as an intimation to the defendant that the document would not be used, as the attempt to put it in issue was unsuccessful. After the result of that application the admission of it would necessarily be a surprise upon him.

Judgment.

The bill was afterwards dismissed, with costs.

WELLAND v. LORD MIDDLETON.

1844.
Feb. 7, 8.

THE question in this case was, whether a letting of certain lands was within a leasing power, by which the donee of the power was restricted to leasing at the full value. Among other evidence of the value, a compared copy of the Poor-law valuation of the lands, extracted from the valuation of the Union, was tendered in evidence.

The Poor-law valuation is, as a public document, evidence of the value of the lands comprised in it.

1844.
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Mr. *Monahan*, Mr. *Baldwin* and Mr. *Hughes*, argued that it was admissible as a copy of a public document; and referred to several sections of the Poor Relief Act, 1 & 2 Vic. c. 56, and cited *Rex v. King (a)*.

Argument.

Mr. *W. Brooke* and Mr. *Pigot*, contra, contended that the Poor-law valuation was not a public document within the meaning of the rule; that by the 66th section any pre-existing valuations might be used; and that in fact the valuation was not a test of the real value, for all that was aimed at was an equable valuation, and it was quite immaterial whether as a whole it was too high or too low.

Judgment.

The LORD CHANCELLOR.

This is a mere matter of curiosity; for the evidence of several witnesses has been read, who swear to what the valuation is under the Poor-law, so that the admission of this document is not material. But I was struck with the point being made, for the same documents, or rather similar extracts, have been often admitted in evidence without objection. It is admissible as being a public document and made for public purposes, and coming from the proper custody. By analogy to the case of the land tax and similar instances, I think it should be received. The weight to be given to it is another consideration. It is conclusive for the purposes of the rate under the Act, but when used for this suit it is open to observation. As has been urged, if the valuation be equable it is not material whether, as a whole, it be too high or too low; and in that view it is not much to be relied on, further than that perhaps no one would wish, in such a public document, to be too highly valued. I think, therefore, that it is not at all conclusive, but it is admissible.

An issue was afterwards directed in the cause.

(a) 2 T. R. 234.

1848.
Chancery.

KELLY v. BENNISON.

Oct. 25.

THIS was a suit for an account against an agent. The agency was denied by the defendant. A lady named Morgan had precisely the same interest in the fund in respect of which the account was sought which the plaintiff had. She and her husband, Mr. Morgan, were both made defendants. The latter was examined as a witness for the plaintiff. When his depositions were about to be read—

A defendant whose interest in the suit is so coincident with that of the plaintiff, that he might have been made a co-plaintiff, is nevertheless, under the 6 & 7 Vic. c. 85, a competent witness for the plaintiff.

Mr. *Greene* and Mr. *Martley*, for the principal defendant, objected that Morgan was an incompetent witness; that his interest was precisely the same as the plaintiff's, and if his examination was allowed, any one could be made a witness by a dexterous contrivance of the record, merely making him a co-defendant instead of a co-plaintiff, and an objection be thus evaded in almost every case; that he was a person on whose immediate behalf the suit was brought, and would be plainly incompetent at law; and that the proviso as to examining co-defendants, in the end of the 1st section of statute 6 & 7 Vic. c. 85, must be qualified by the preceding provisions, and cannot be read as introducing different rules in Law and in Equity. They cited *Monday v. Guyer* (a).

Argument.

The *Attorney-General* and Mr. *Christian*, contra, admitted that the question was precisely the same as if Mrs. Morgan was examined, and that her interest was coincident with the plaintiff's; but contended that the effect of the statute 6 & 7 Vic. c. 85, was to make every co-defendant under any circumstances a competent witness in Equity at the option of the plaintiff. They relied on *Wood v. Rowcliff* (b).

(a) 1 De G. & Sm. 182.

(b) 6 Hare, 183.

1848.
Chancery.
 KELLY
 v.
 BENNISON.
 Judgment.

THE LORD CHANCELLOR.

I will receive the evidence on the authority of the case before V. C. Wigram (a). There is less danger in receiving it than in rejecting it. If the defendant is so advised he must have the true construction of this Act (b) settled on appeal by the highest tribunal in the kingdom. It is difficult to say that the express words of the Act have not enabled a party to do what is done here, though it is, no doubt, contrary to all former principles of the law of evidence. If the enactment stopped at the word "respectively" before the proviso which closes the first part of the section, the effect might have been wholly to exclude co-defendants, and the proviso with which the section concludes is added to prevent that result. It provides that in Courts of Equity a defendant in any cause may be examined as a witness on behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions. If the Act stopped even there, there would not be such difficulty in the construction; but it goes on to say, "and that any interest which such defendant so to be examined may have in the matters or any of the matters in question in the cause shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness." Now, what interest can a defendant have who is examined for a plaintiff, which could affect his competency as a witness? It must plainly be an interest on the side on which he is to be examined, and therefore to some extent concurrent with the plaintiff's. Where then is the line to be drawn? The co-defendant here is not, it is true, interested in the very money which is to come to the plaintiff; but it is perfectly plain that he is interested in the matters in dispute, and that his interest, or rather his wife's, which is the same thing in effect, is precisely similar to that of the plaintiff. But I cannot read the words of the statute so as to exclude him, they are so general. If a case such as this had been presented to the Legislature they would probably have provided against this consequence. It is plainly an encouragement for making an "arrangement" of the

(a) *Wood v. Rowcliffe*, 6 Hare, 188.

(b) 6 & 7 Vic. c. 85.

record, to use no harsher phrase; but it is not provided against; and I must therefore follow the decision of Vice-Chancellor Wigram (a) notwithstanding the doubts expressed by Vice-Chancellor Bruce (b). The weight to be given to the evidence is open to much observation, but I must admit it.

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Chancery.
KELLY
v.
BENNISON.
Judgment.

The bill was afterwards dismissed, with costs.

- (a) *Wood v. Rowcliffe*, 6 Hare, 183.
(b) See *Monday v. Guyer*, 1 De G. & Sm. 182.

WALSH v. WALSH.

Nov. 9.

MR. MARTLEY, for the plaintiff in this cause, asked for a receiver; and a question incidentally arising in the argument, the Clerk in Court (Mr. Darley) stated the practice at the Rolls, on motions for extending receivers, to be to give notice to the debtor only, and not to the other parties who had appointed or previously extended the receiver, and that Counsel would be heard only for the party moving to extend the receiver and for the debtor.

On motions to extend receivers, the only persons entitled to be heard are the petitioner and the debtor, and not the parties who have appointed or previously extended the receiver.

The LORD CHANCELLOR said he found the practice at the Rolls to be as stated by Mr. Darley, and that he considered it a good practice.*

Nov. 10.
Judgment.

* See next case.

1848.
Chancery.

GOLDSMIDT v. LORD GLENGALL.

Nov. 11.

A mortgagee having obtained a conditional order for a receiver under the Mortgage Act, payments were made on account of interest, and a receiver was appointed by a judgment creditor. A petition being presented by the mortgagee, the conditional order was made absolute, and the receiver extended to the mortgage, in chamber. On an affidavit stating the intermediate payments, the order was set aside.

A judgment creditor having a receiver is not entitled to notice of a petition by a mortgagee to extend him to the mortgage.

Argument.

Messrs. GOLDSMIDT, in 1847, presented a petition for a receiver under the Mortgage Act against Lord Glengall. After service of the conditional order for the appointment of the receiver on Lord Glengall, no further proceeding was taken until July 1848, when they presented a petition to make absolute the conditional order, stating the additional circumstance that a receiver had been appointed by Norris, a puisne judgment creditor of Lord Glengall, under the Sheriffs' Act, and praying that that receiver might be extended to their mortgage. An order was made according to the prayer of this petition, by the Lord Chancellor, in chamber.

Mr. *Hughes* and Mr. *R. Walker* now moved to set aside the order made in chamber, upon an affidavit stating that no notice had been served on Norris, and that after the date of the conditional order a considerable sum (no amount being stated) had been paid on account of the mortgage by Lord Glengall, which was not denied in the answering affidavit. They cited *Lynch v. Nolan* (a); *Attorney-General v. Mayor of Liverpool* (b); *Hemphill v. McKenna* (c), to show that the suppression of the fact of the subsequent payments was sufficient ground for setting aside the order.

Mr. *Martley* and Mr. *Norman*, contra, argued that it was unnecessary, according to the practice of the Court, to give notice to Norris,* and that the payments were quite immaterial, as under the Mortgage Act (11 & 12 G. 3, c. 10), the Messrs. Goldsmidt would have been entitled to keep the receiver till *all* the arrears of interest were discharged; and there was no question that the year and-a-half's

(a) 10 Ir. Eq. Rep. 57.

(b) 1 My. & Cr. 171.

(c) 6 Ir. Eq. Rep. 57.

* See *Walsh v. Walsh*, ante p. 807.

interest was due at the date of the conditional order, at which time the order must be considered to have been made. They cited *Houlditch v. Donegal* (a); *Boyd v. Burke* (b); *Abbott v. Stratton* (c).

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Chancery.
GOLDSMIDT
v.
LORD
GLENGALL.

The LORD CHANCELLOR.

I have great difficulty in sustaining this order, on account of the payments. There might be nothing at all due for interest. If it had been stated in the petition that a year's interest, for example, had been paid over since the conditional order, and that only half a year's interest was due, or that only £10 remained due, I would not have made the order—at least without notice to Lord Glengall.

Judgment.

As to the other objection, I would not disturb the Rolls practice respecting notice to the creditor who appointed the receiver.

I will set aside the order, without costs.

(a) 1 Dr. & Wal. 503.

(b) 8 Ir. Eq. Rep. 660.

(c) 9 Ir. Eq. Rep. 233.

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See also ASSETS, 3.

AGENT.

A testator named A a trustee of part of her personal estate, and appointed him, her son and X's husband, executors. The son and X's husband alone proved the will, but A did not disclaim. The son and X took life interests in the trust fund, to a part of which the plaintiff became, by X's appointment, entitled. A had been the testator's agent, and acted in the management of the assets under powers of attorney from the executors who proved and X, and after the

ALLOCATION.

son's death, from the surviving executor and X, which authorised him to receive the assets for the uses and purposes of the will. On A's death the defendant, his son and executor, acted under a similar power, and continued to do so after the death of X's husband. X and her husband got possession of the entire assets. *Held*, that A and the defendant were responsible as trustees, and could not protect themselves as being agents only. C. *Montgomery v. Johnson* 476

ALLOCATION.

Of rents. *See* RECEIVER, IV.

AMENDMENT.

I. Of Bills.

1. Irregular after notice of motion to dismiss bill. R. *Mark v. Willington* 269
2. The plaintiff has six weeks, under the 75th Rule, to except to the answer to an amended bill. R. *Garvey v. Hayes* 270
3. Therefore, a motion for liberty to make a second amendment is in time in twelve weeks after the answer. *Ibid*
4. Extent of alteration allowed by an order at the hearing, giving liberty to amend by adding parties, and the cases on this subject reviewed. R. *M'Namara v. Blake* 527, 547, &c.
5. The amendments may be by supplemental bill. *Ibid*
See further, BILL, 7, &c.
6. A document, liberty to introduce which is refused, cannot be used afterwards at the hearing. C. *Swift v. M'Tiernan* 602

II. In other matters.

See APPEARANCE.
DECREE.

APPEARANCE.

ANNUITY.

See JURISDICTION, 1, 2.

ANSWER.

1. The enrolment of a final decree vacated, a decree *pro confesso* and report thereunder set aside, and the defendant allowed to answer, under peculiar circumstances, the bill having been taken *pro confesso* after an interview with the plaintiff's solicitor, by which the defendant swore he was deceived, and the decrees being plainly against his just rights. C. *Murray v. Byrne* 125
2. Under the 75th Rule the plaintiff has six weeks to except to the answer to an amended bill for insufficiency. R. *Garvey v. Hayes* 270

APPEAL.

1. After dismissal of a bill with costs, the defendants were stayed from enforcing them, pending an appeal to *Dom. Proc.*, the plaintiffs giving security and paying interest upon them. C. *M'Carthy v. M'Carthy* 399
2. It is not necessary that the £10 lodged on appeal motions should be lodged before serving the notice of appeal. C. *Mannix v. Drinan* 398
3. The rule against re-hearing an appeal motion is not inflexible; but it is a sufficient ground for refusing it that the case has been already anxiously considered. C. *Langford v. Mahony* 319
4. A reference to appoint a receiver sent back to the Master, though the Master's selection had been affirmed by the Master of the Rolls. C. *Lupton v. Stephenson* 484

APPEARANCE.

1. Where a defendant is served with subpoena in Ireland, the Court has no jurisdiction to make an order that a parliamentary appearance be entered for an adult defendant, or that the clerk in Court should be appointed to appear and answer for a minor

APPEARANCE.

- defendant, after the fourteen days specified in the 33rd Rule have expired, the side-bar order not having been entered within such fourteen days. R. *Anonymous* 584
2. But where the appearance is entered within the fourteen days, it may, as well as the side-bar rule, be amended. R. *Egan v. Nolan* 585
 3. The defendant residing out of the jurisdiction, an order was made on December 12th to substitute service of subpoena and notice on W. for him; but it did not state when the defendant was to appear, as required by the 31st General Order. The subpoena required him to appear in eight days and to answer in two months. A parliamentary appearance was entered on the 8th of January. On the 12th of March the defendant entered a common appearance. *Held*, that if the order of the 12th of December was irregular in not stating where the defendant was to appear, the irregularity was waived by the common appearance. R. *Johnston v. Tottenham* 271
 4. In suits against a *feme covert*; See HUSBAND AND WIFE.

APPOINTMENT.

See POWERS, I (Appointment).

Costs of appointees. See COSTS, 1.

APPROPRIATION.

See ASSETS, 1.

ASSETS.

1. A testator being entitled to a charge on the estate of S. and to Government stock, bequeathed, amongst other legacies, £2500 to M., and directed that the charge should be called in to pay the legacies, and that the annual interest of the charge in the meantime and the stock should be appropriated in payment of two legacies of £500, to be paid first out of the stock, and the deficiency, if any, out of the interest on the charge,

ASSETS.

3

- and if these should prove insufficient, out of the principal. The executor having proved the charge in a suit against the estate of S., received and misapplied a great portion of it, and then executed an agreement that £2500 of the sum reported on the charge should be paid to M., and that she should be considered the actual owner; and that sum was afterwards reported payable to her. The assets being deficient in consequence of the *devastavit*, *Held*, that the transactions between the executor and M. were not an appropriation tantamount to payment so as to give her priority over the other legatees. C. *Molloy v. French* 376
2. "An executor having assets sufficient may pay a legacy, but he cannot otherwise deal with the assets so as to give the legatee such a right as will prevent him being obliged to refund." *Per* BRADY, L. C. *Ibid* 381
 3. B the younger son of a judgment debtor was entitled to part of a charge on his estates, and died in 1792, having made a will, bequeathing the charge to A his brother. A died in 1793, leaving his father his next-of-kin, who died in 1800. A trustee for X, who was entitled to another part of the charge, filed a bill in the Exchequer in 1807. X having taken administration as in case of intestacy to B, the report finding B's charge due to him found, as an admission of the parties, that it belonged to Y, a representative of a sister who was untruly stated to be B's next-of-kin. On X's death Y became B's administratrix, and in another suit, in the Exchequer, the sum was reported due to her in 1834, she being then also administratrix to the debtor. In 1822 B's will was proved, and administration *cum test. annex.* granted to X's representative. In a suit to raise the judgment, *Held*, that the balance of B's charge could be attached as personal estate of the debtor, the creditor not being bound by the Exchequer

ASSETS.

proceedings; but that to make it available, accounts should be taken of the estates of B and A, against which the representative of X had claims, and that the Exchequer proceedings did not bind X and Y to admit there were no debts, &c., of A and B. C. *Foster v. M'Mahon* 287

4. Suits respecting assets. See CREDITORS' AND ADMINISTRATION SUITS.

ATTORNEY.

See SOLICITOR AND CLIENT.

AUCTION.

See SALE UNDER THE COURT, IV.

AUTHORITY.

See SOLICITOR AND CLIENT.

BANK STOCK.

See BONUS.

BANKRUPTCY.

1. Section 87 of statute 6 W. 4, c. 14 (section 73 of the English Bankrupt Act, 6 G. 4, c. 16), is retrospective as to conveyances made before the Act. *Semble*, it is not so as to Commissions before the Act. C. *Clements v. Eccles* 229
2. The 7th General Order in Bankruptcy applies to equitable mortgages. C. *In re M'Cullagh* 466

BIDDING.

See SALE UNDER THE COURT.

BILL.

I. Parties.

1. In a suit instituted to set aside certain securities entered into by the plaintiff to trustees for the separate use of one of the defendants, as the plaintiff's wife, the plaintiff alleged that she had been previously married to A, and examined A, who proved the fact of the marriage. *Held*, that A was not a necessary party to the suit. C. *Scott v. Scott* 74

BILL.

2. In an administration suit by one of the next-of-kin of an intestate, the other next-of-kin are within the 15th General Order, and the plaintiff must pay their costs if they are required to answer. C. *Beddy v. Smith* 467
 3. "Where a supplemental bill is filed merely for the purpose of adding parties, it is not necessary to bring the former defendants before the Court in the supplemental suit. In such case both the suits are set down and come on together. But where the frame of the suit and the relief prayed are altered, and where all the defendants are interested in the new question raised by the bill, all persons who were necessary parties to the former suit are necessary parties to the present bill." *Per SMITH, M. R. M'Namara v. Blake* 555
 4. "Where liberty is given at the hearing to *amend* by adding parties, the plaintiff may bring the parties before the Court by a supplemental bill." *Per SMITH, M. R. Ibid* 544
- See also Nos. 6, 8, 12, *infra*.

II. Bills to carry out, vary or review former suits, and of supplement and revivor.

5. In a renewal suit against the defendant, tenant for life, and his eldest son, the question was, whether the denomination X was included in the lease, or was part of an adjoining farm held by the plaintiff for a determinable interest? A decree was made for a renewal, and referring it to the Master to enquire and ascertain the boundaries. The interest in the farm having afterwards expired, the defendant brought an ejectment for X, which the plaintiff defended and obtained a verdict. Defendant's son having died, and his second son, a minor, become tenant in tail, a new bill was filed against the defendant and this son, which stated the ejectment, and that the question tried in it was identical with that involved in the reference; but the decree, made in

1844, which accorded with the prayer, only directed the former decree to be carried out between the parties. In 1845, the son being of age barred the entail, and conveyed the fee to the defendant. A bill was then filed relying on the ejectment, and praying a declaration that it was unnecessary to carry on the reference, and that the former decrees might be in other respects carried out. *Held*, that such relief was a variation of the decree of 1844, which could not be given without re-hearing the cause; and *Seemle*, this was a bill of review, which should not have been filed without leave of the Court. C. *Chute v. McGillicuddy* 312

6. Under the decree to account in a suit instituted by A, a creditor on the inheritance, B having a puisne charge on a five hundred years' term, proved it, and it was reported. The cause was brought to a final hearing, and a decree made for a sale of the *inheritance* for payment of A and the other creditors. Supplemental suits were afterwards instituted by A's representatives, who were ultimately settled with, and no sale was had. B's representatives filed a bill praying the benefit of the former decree, and to have a sale of the *term*, making A's representative a notice party. *Held*, that as B was not entitled to such a decree as was made in A's suit, it could not be carried out for the plaintiff, or cut down so as to be limited to the term, at least in the absence of A's representatives, who might still have rights under it. C. *M'Namara v. Blake* 455

7. A bill, filed in 1844, to raise a sum secured on a term created by a settlement of 1773, stated at length the proceedings in a suit of A *v.* B by a prior judgment creditor, and prayed the benefit of the decrees and accounts therein, that the decrees might be carried into execution, so far as necessary for the plaintiff's relief, and a sale of the term. The cause stood over at the hearing to make two

minors parties by supplemental bill. One of them, X, by his answer, impeached the decrees in the suit of A *v.* B, and both claimed as purchasers for value under a settlement of 1842, made by W. At the hearing of the supplemental cause, in June 1847, plaintiff's Counsel contended that X could not impeach the decrees, as he claimed under W, who had acquiesced in them, and an order was made that the further hearing of the cause should stand over, with liberty to the plaintiff in the meantime to bring before the Court the parties beneficially interested in the decrees in A *v.* B. The plaintiff filed a supplemental bill, setting out the whole of the proceedings in A *v.* B, and the suit of 1844; certain assignments of the judgment and sum decreed in A *v.* B for the benefit of W, charging that W and X, and the parties claiming under the assignment in A's right, could not object to have the decrees carried into execution, and praying that they might be carried into execution against them, and that the plaintiff might have the benefit thereof; or if the Court should be of opinion that they could not be carried into execution, according to the terms thereof, with such modification as to the Court should seem meet; and that plaintiff's claim and all prior and contemporaneous charges might be raised by a sale of the term of 1773. The Court refused to take the bill off the file as irregular; but *Held*, on demurrer, that the order of June 1847, though it authorised the filing of a supplemental bill to bring new parties before the Court, did not warrant the making of a new case; and that the case of estoppel, and the prayer that the decrees might be modified and altered, was a new case and not warranted by the order. R. *M'Namara v. Blake* 527

8. *Seemle*—The frame of the suit and relief prayed being altered, all the necessary parties to the suit of 1844 should be parties, particularly the

- party representing the term of 1773.
R. M'Namara v. Blake 527
9. The extent of alteration allowed under such liberty at the hearing considered, and cases on the subject reviewed. *Ibid* 547, &c.
10. Office of a supplemental bill for carrying out a former decree observed on by SMITH, M. R. *Ibid* 554
11. There is no rule requiring a bill of revivor to be filed within six years of the abatement—*Semble. C. Foster v. M'Mahon* 287

III. For Discovery or Relief.

12. A bill of discovery in aid of a defence at law will not lie against one who is not a party to the record at law. *R. Anderson v. Dowling* 590
13. If a bill prays relief and discovery, the plaintiff cannot waive the relief, and insist on the discovery. *Ibid*
14. A bill by the directors of an Insurance Company stated matters which amounted to a legal defence, and prayed a discovery of said matters, that a policy of assurance might be delivered up to be cancelled, and an injunction to stay an action at law brought on it. The bill was against A, the administratrix of the assured, and B, the assignee of the policy, in concert with whom and by whose directions the bill charged the policy to have been effected, but who was not a party to the action. The Court refused the injunction on the bill as a bill of relief, because it stated facts amounting to a defence at law, or as a bill of discovery, because it prayed relief which the plaintiff could not waive. *R. Anderson v. Dowling* 590

IV. Bill or Information.

15. The Charitable Bequests Act, 7 & 8 *Vic. c. 97*, authorising the Commissioners of Charitable Donations to sue for devises or bequests withheld, concealed or misapplied, and to apply them according to the devisor's inten-

tion, gives the Commissioners such an interest as entitles them to file a bill for the removal of a testamentary trustee for a charity and the appointment of new trustees; and the proceeding need not be by information. *C. Commissioners of Donations v. Archbold* 187

V. Other matters.

16. As to the necessity of putting documents in issue; *See EVIDENCE, II.*

See also AMENDMENT.

DISMISS.

JURISDICTION.

PRO CONFESSO.

BONUS.

A bonus declared by the Bank of Ireland on their stock, in addition to the annual dividend, *Held*, not to be in the nature of annual profits, but an accretion of the capital, the interest of which only belongs to the tenant for life of stock which is in settlement. *C. Ex parte Hodgins* 99

BOUNDARIES.

The bill stated that the lands of B, part of which contained one hundred and fifty-nine acres, and part forty-six acres, had been for many years previous to 1794 held by the same tenants, so that the boundaries became confused. That in 1804 A was seised in fee of the one hundred and fifty-nine acres, and held the forty-six acres under a lease from X for a term. That the mearings and boundaries of the forty-six acres had not since been ascertained, the entire of the lands having been since the lease, as they had been for one hundred years before, held by the same persons, who were owners of the fee-simple lands. That they had been so mixed up, that it was impossible to discover the boundaries, or to ascertain where the forty-six acres were situated. The bill, after deducing the title of the plaintiff from A, stated that the defendant claimed

BOUNDARIES.

to be entitled to the forty-six acres as assignee of X, and that the plaintiffs' interest under the lease had determined, and prayed a partition or a commission to ascertain the boundaries. *Held*, on demurrer, that it could not be sustained for a partition, as no title to a partition at law was shown, nor as a bill to ascertain boundaries, as the parties were independent proprietors, the inference being that the defendant was in possession of the forty-six acres, and that the owner of the fee-simple lands, and not the defendant, was responsible for the confusion of boundaries. R. *O'Hara v. Strange* 262

2. Confusion of boundaries, unless it arose from the defendant's misconduct, is not *per se* a ground for a bill to ascertain boundaries. *Ibid*

CAPITAL.

See BONUS.
INFANT, 1, 2.

CAUSE, CONDUCTING.

See HEARING.
SETTING DOWN CAUSE.

And the titles referred to in PRACTICE.

CHARGE.

Clauses in several Acts, treating certain payments relating to glebes as charges, but which give no remedy in equity, observed on. C. *Brooke v. Horner* 222, 224

See further, GLEBES.

And *See* LIMITATIONS, STATUTE OF, I.
WILL, IV.

CHARITABLE DONATIONS AND BEQUESTS.

CHARITABLE TRUSTS.

1. The Charitable Bequests Act 7 & 8 Vic. c. 97, authorising the Commissioners of Charitable Donations to sue for devises or bequests withheld, concealed or misapplied, and to apply them according to the devisor's intention, gives the Commissioners such

CONDITIONAL SALE. 7

an interest as entitles them to file a bill for the removal of a testamentary trustee for a charity and the appointment of new trustees; and the proceeding need not be by information; and such relief will be granted on account of the mere personal unfitness of the trustee. C. *Commissioners of Donations v. Archbold* 187

2. Form of decree for removing a trustee who may still be entitled to a control as to the objects of the charity. *Ibid*

(Since reversed in *Dom. Proc.*)

3. Grounds for which a trustee may be removed observed on, by BRADY, L. C. *Ibid*, 195-6.

CHURCH TEMPORALITIES.

See GLEBES.

CLERGY.

See GLEBES.

CO-DEFENDANT.

See EVIDENCE, III.

COMPENSATION.

See SALE UNDER THE COURT.

COMPETENCY.

See EVIDENCE, III.

COMPROMISE.

Distinction between voluntary arrangements and those where the rights of third parties intervene, as regards the non-enforcement of, or relief against, the strict performance of the conditions, explained, by BRADY, L. C. *Carroll v. O'Connor* 209, &c.

See further, PENALTY.

And *See* FRAUD AND SURPRISE.

CONDITION.

See PENALTY.
WILL.

CONDITIONAL SALE.

A, being in prison as an insolvent, assigned to B a leasehold interest, for a

sum of money which discharged all A's debts, including debts to B and head rent, but was less than the value. The deed purported to be an absolute sale, but there was an indorsement that if A paid B, upon a day named, the purchase-money and costs, and all expenses of cropping the farm, B would re-assign the lands and the deed should be void. B also a few days after gave a bond to surrender the premises if paid on the day. The same attorney acted for both parties. *Held*, under the circumstances, that the transaction was a mortgage and not a conditional sale. C. *Fee v. Cobine* 406

CONFUSION OF BOUNDARIES.

See BOUNDARIES.

CONSENT.

1. The Court will not, on the application of the client, set aside an order made on a consent signed by his solicitor, on the allegation that he acted without authority, there being no case of fraud or misrepresentation. R. *Connatty v. O'Reilly* 333
2. Where the parties before decree entered into a consent to take accounts, which was made a rule of Court, and a Master's report obtained on it, upon which the cause was set down; *Held*, the cause could not be heard. C. *Hodnett v. Going* 421

CONSIDERATION.

See DEEDS, II.

CONSTRUCTION.

See DEED, I.

POWER.

STATUTE.

WILL.

CONTEMPT.

Decree *pro confesso* against a defendant, although the plaintiff was in contempt when the cause was set down, the costs having been paid before the

COSTS.

decree was pronounced. R. *Casey v. Casey* 327

CONTRIBUTION.

See JUDGMENT, VI.

CONVEYANCE.

See DEEDS.

COSTS.

General Order as to registering judgments, &c., p. vi.

1. The separate appointees of portions of an entire charge (and not those claiming partial or sub-interests in portions of it) are entitled to separate costs as defendants in a suit relating to the estate charged. C. *Hoops v. Kingston* 471
2. The costs of a suit in the nature of an ejectment bill, to recover devised property on a certain construction of a will, though doubtful, are not within the rule in administration suits, that they come out of the estate. C. *Johnson v. Brady* 386
3. Using documents not noticed in the bill, by which the defendant is taken by surprise, is a mode of proving a case which may affect the costs of the suit. C. *Crosbie v. Thompson* 404
4. Costs of a creditor's suit not refused because a cheaper remedy lay under the Sheriff's Act; for it is not a general rule that a plaintiff to whom the law has given two remedies is bound at the peril of costs to select the cheaper. *Per* Commissioners. C. *Fetherston v. Mitchell* 40, 49
5. In administration suits, concerning personal estate, where there is no fund to pay the plaintiff, the general rule is, that the plaintiff does not get costs out of a fund belonging exclusively to creditors of a higher degree, unless they be salvage costs, or there are special circumstances. And where the plaintiff, a simple contract creditor, knew that the judgment debts would exhaust the assets, as they did, and her object in the suit was to have a certain fund decreed to be equitable

assets, in which she failed, no costs were given. *C. Fisher v. King* 460

Meaning of salvage costs discussed. *Ibid*

6. A creditor, plaintiff in an administration suit to carry out the trusts of a voluntary deed, including personal estate, is entitled to his costs in the first instance, having put the personal estate in a train to be realised. *C. O'Dowda v. O'Dowda* 464

7. Plaintiff in an administration suit, being a next-of-kin, making the other next-of-kin answering parties, must pay the costs under the 15th Order. *C. Beddy v. Smith* 467

8. Where a cause is set down for a dismissal, the defendant setting it down is alone entitled to costs, and any other defendants appearing will not get costs. *C. Purcell v. Purcell* 516

9. Costs are never given against the Crown in *scire facias*. *C. The Queen v. Hobart* 397

And See APPEAL, 1, 2.

CONTEMPT.

INCUMBERED ESTATES ACT, 3.

RECEIVER, V.

SECURITY FOR COSTS.

SOLICITOR AND CLIENT.

COUNSEL.

See HEARING.

CREDITOR.

See Titles referred to DEBTOR AND CREDITOR.

CREDITORS' AND ADMINISTRATION SUITS.

1. In a suit to raise a judgment after the death of the conusor, seeking the usual accounts of his real and personal estates, it was never necessary, previous to the suit, to sue out an elegit. *C. Foster v. M'Mahon* 287

2. The saving in the 22nd section 3 & 4 *Vic. c. 105*, of the rights of incumbrancers prior to the 1st of November

1840, is solely for their protection; and therefore in a suit by a judgment creditor for a sale of the conusor's lands in his lifetime, he cannot rely on the existence of such incumbrances if the owners of them do not object. *C. Kieran v. Corr* 514

3. B, the younger son of a judgment debtor, was entitled to part of a charge on his estates, and died in 1792, having made a will bequeathing the charge to A his brother. A died in 1793, leaving his father his next-of-kin, who died in 1800. A trustee for X, who was entitled to another part of the charge, filed a bill in the Exchequer in 1807. X having taken administration as in case of intestacy to B, the report finding B's charge due to him found, as an admission of the parties, that it belonged to Y, a representative of a sister who was untruly stated to be B's next-of-kin. On X's death Y became B's administratrix, and in another suit in the Exchequer the sum was reported due to her in 1834, she being then also administratrix to the debtor. In 1822 B's will was proved, and administration *cum test. annex.* granted to X's representative. In a suit to raise the judgment, *Held*, that the balance of B's charge could be attached as personal estate of the debtor, the creditor not being bound by the Exchequer proceedings; but that to make it available, accounts should be taken of the estates of B and A.—*C. Foster v. M'Mahon* 287

4. The practice here and in England, when the plaintiff in a bill for foreclosure and redemption does not redeem within the time specified by the decree, observed on and distinguished, by SMITH, M. R., in *Ex parte Hutton* 163, 165, 166

5. Form of decree and practice in Ireland in a suit by a puisne creditor for redemption and sale. *Ibid* 160

6. The conflict of authority whether there can be a sale in Court subject to a mortgage, and whether it makes

any difference that the title deeds are in possession of a mortgagee, observed on, by *SMITH, M. R.*, in *Ex parte Hutton* 163, 166, 167

7. *Semble*, this Court will sell an estate subject to incumbrances. C. *Kieran v. Corr* 514

8. The Court is not bound to make an order under the 102nd Rule in favour of a puisne incumbrancer. Refused where a petition was presented by a party, the consideration of whose security was impeached. R. *Heenan v. Berry* 587

9. Amendment of decree in a supplemental suit instituted after 1843, by directing accounts of puisne incumbrancers, refused, as not a matter of form. *Quære*, if the rule applies to supplemental bills? C. *Bradley v. Davis* 134

10. Form of enquiry in an incumbrancer's suit, where the deeds are in possession of a solicitor, a defendant, who claims a lien for costs which is disputed. C. *Walcott v. Graves* 396

11. Appropriation of rents. *See RECEIVER, IV* (Allocation).

12. Extension of receiver by a creditor on the inheritance, from a suit against tenant for life after death of the latter, regular. C. *Goldsmidt v. Donegal* 412

13. In an administration suit by one of the next-of-kin of an intestate, the other next-of-kin are within the 15th General Order, and the plaintiff must pay their costs if they are required to answer; and the objection need not be made at the first hearing. C. *Betty v. Smith* 467

14. Costs in an administration suit payable to plaintiff only with his demand. C. *Fisher v. King* 460

15. Plaintiff's costs in suit to execute a voluntary trust deed, held payable in the first instance. C. *O'Dowda v. O'Dowda* 464

And *See COSTS*, 1 to 6.

DECREE.

See also ACCOUNTS, 1, 2.

EQUITABLE PROTECTION.
LACHES.

LIMITATIONS, STATUTE OF.
MORTGAGE, II (Accounts).
SALE UNDER THE COURT.

CROWN.

In *scire facias* costs cannot be given against the Crown. C. *The Queen v. Hobart* 397

CUMULATIVE GIFTS.

See WILL, III.

CUSTODIAM.

See LIMITATIONS, STATUTE OF, 16.

DEBTOR AND CREDITOR.

As to fraudulent and voluntary conveyances; *See* DEEDS, II.

Joint debtors; *See* JUDGMENT, VI.

Strict performance of conditions of compromise; *See* PENALTY.

And *See* CREDITOR'S SUIT.
EVIDENCE, 3.

DECREE.

1. A former decree dismissing a bill if not enrolled and pleaded is not an absolute bar to another suit for the same demand; if it is relied on by answer and appears not to have been on the merits it is no defence. C. *Joly v. Swift* 410

2. Though trustees are protected in acting under the decision of a competent tribunal, the protection does not extend to persons receiving payments out of a fund for themselves; and though the decision has been long acted on, it is no protection to such persons against the claims of others not bound by it. C. *Foster v. McMahon* 287

3. The enrolment of a final decree vacated, a decree *pro confesso* and report thereunder set aside, and the defendant allowed to answer, under peculiar

circumstances, the bill having been taken *pro confesso* after an interview with the plaintiffs' solicitor, by which the defendant swore he was deceived, and the decrees being plainly against his just rights. *C. Murray v. Byrne*

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4. Distinction between decrees on default and on the merits as to opening the enrolments of them. *Ibid*
5. The earlier authorities as to opening enrolments are some of them not to be followed. The difficulty of complying with such applications observed on, by *BRADY, L. C. Ibid*
- 132, 134
6. The original decree, pronounced before 1843, contained no directions to take an account of subsequent incumbrances. A decree on a bill of supplement and revivor, made in 1846, also omitted to direct such an account. The Court refused to amend the latter decree under the 103rd General Order by adding the direction, as it is not a matter of form; and *quære*, whether the 102nd General Order applies to supplemental suits? *C. Bradley v. Davis*
- 134
7. The Court is not bound to make an order under the 102nd Rule in favour of a puisne incumbrancer. Refused when petitioner's security was impeached. *R. Heenan v. Berry*
- 587
8. Forms of decrees in peculiar cases. *See CHARITABLE TRUSTS AND SOLICITOR (Lien).*
9. Suits to carry out, vary or alter decrees. *See BILL, II.*

DEEDS.

I. Construction.

1. Lands were conveyed by marriage settlement to trustees for nine hundred and ninety-nine years, upon trust during so many years of the term as A. should live to pay the rents to her, or as she should appoint, and subject to a charge of

£10,000 to pay to H. for so many years as he should live after the decease of A., an annuity of £1000, and to pay the residue of the rents as A. should by deed or will appoint; and as to the residue of the term after the decease of A. and H., it was declared that the same was limited in trust that if there should be younger children of the marriage the trustees should by sale or mortgage of the residue of the term, and by the rents and profits thereof in the meantime, and until such sale, raise the sum of £15,000 for the portions of such younger children, the portions to be paid to sons at twenty-one, and to daughters at twenty-one or marriage, and should, out of the rents in the meantime, and until the portions be payable, raise such yearly sums for the maintenance and education of the younger children as A. should deem meet, not exceeding the interest of the respective portions at the rate of £5 per cent: provided, that if any of the children should die before his portion should become payable, it should be divided among the survivors. A. died, and a bill having been filed to raise the principal and interest of the £15,000; *Held*,—1, That the Court had no power under the settlement to direct a sale of the term in possession during the life of H.—2, That the Court could not sell so many years of the term as should be unexpired at the death of H., as the security of the prior charges would thereby be impaired.—3, That interest was payable on the £15,000 from the death of A., and during the life of H. *R. Lloyd v. Massy*

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And *See POWER, I, II.*

II. Consideration, Voluntary and Fraudulent Conveyances.

2. S. being seised in fee of K., X and other lands, by deed of February, reciting that he had charged his unsettled estates with £2000 for his daughter, conveyed K. and X to B. his eldest son for life, with remain

- to his issue in tail, in consideration of which B. covenanted to pay all S.'s debts and incumbrances. By deed of the 12th of June between S., B. and W. (another son of S.), reciting that S. intended to convey K. to W., he conveyed X to B. and his issue, as in the former deed. Both deeds recited other provisions made for W. and other children in lieu of charges on estates settled on B. in remainder. By deed of the 13th of June, between S., B. and W., S. conveyed, and B. confirmed, K. to W. for life, remainder to his issue in tail. B. paid off the debts and charges. On the death of S., W. went into possession of K., and so continued until his death. In a suit by the son of B., *Held*,—1, That the deed of February was for valuable consideration, which extended to the issue of B.—2, That the deed of the 13th of June was a voluntary deed, no consideration moving from W. to S.—3, That even if both deeds were voluntary, the deed of February should prevail; and that neither S. or B., or both of them, could revoke it by a subsequent voluntary settlement. C. *Scott v. Scott* 487
3. Observations on the mode in which Courts test the considerations for family settlements, and the distinction between pecuniary and marriage considerations as to the objects they include, commented on by BRADY, L. C. *Ibid* 502, 503
4. "It is not competent for a person executing a voluntary settlement to execute a new voluntary settlement, to the prejudice of the former one." *Per* BRADY, L. C. *Ibid* 506
5. Statute 10 *Car.* 1, c. 6, s. 10 (13 *Eliz.* c. 5, *Eng.*) in favour of creditors, avoids only deeds which would deprive them of such property as they could make available without their debtors' aid. Therefore, a settlement by a tenant in tail in 1836, by which he opened and re-settled his estate on himself for life, with re-

- mainder over, is not within it. C. *Clements v. Eccles* 229
6. The solvency or insolvency of the debtor affords no certain test whether a deed is void under that Act; but each case must be judged by all its circumstances. C. *Clements v. Eccles* 229
7. "A bond not available to creditors upon executions is not within the statute (13 *Eliz.*). Copyhold property also has been held not to be within it, though the contrary was held in reference to the statute of the 27 *Eliz.* So that the same property has been held to be within the latter, though not within the former statute, by reason of its not being available for debts." *Per* BRADY, L. C. *Ibid* 238
8. Observations on the meaning to be attached to insolvency. *Ibid* 240
9. Receiver appointed notwithstanding voluntary deed. R. *Beamish v. Phair* 559

III. Other Matters.

10. Form of enquiry as to lien on deeds, and for questions of lien and jurisdiction respecting it. *See* SOLICITOR AND CLIENT.
- Delivery of deeds. *See* INJUNCTION, 2.

DEFENCE.

See ADMISSION.

DISMISS.

EQUITABLE PROTECTION.

EXPENDITURE.

DELAY.

See LACHES.

LIMITATIONS, STATUTE OF.

DELIVERY OF DOCUMENTS.

See INJUNCTION, 2.

DEMURRER.

Rule that the construction of a pleading is to be against the pleader where there is a doubt, enforced by SMITH, M. R. *O'Hara v. Strange* 266, 267

And *See* INTERPLEADER.

DEPOSIT.

DEPOSIT.

See APPEAL, 2.

DEPOSITIONS.

See EVIDENCE, IV.

DEVASTAVIT.

See ASSETS, 1.

DEVISE.

See WILL.

DILAPIDATIONS.

See GLEBE.

DISCOVERY.

See BILL, III.

DISCHARGE OF PURCHASER.

See SALE UNDER COURT, I.

DISMISS.

1. A former decree dismissing a bill, if not enrolled and pleaded, is not an absolute bar to another suit for the same demand; if it is relied on by answer, and appears not to have been on the merits, it is no defence. C. *Joly v. Swift* 410
2. Where the plaintiff has been discharged as an insolvent after the filing of the bill, the proper order under the 82nd or 83rd Rules is, that the bill be dismissed against him without costs, if his assignees do not file a supplemental bill within a specified time. R. *Darling v. Marsh* 261
3. Where a cause is set down for a dismissal, the defendant setting it down is alone entitled to costs, and any other defendants appearing will not get costs. C. *Purcell v. Purcell* 516
4. Amendments of the bill had been prepared by Counsel before, but were not made until after notice to dismiss the bill for want of prosecution. *Held*, no answer to the motion. R. *Mark v. Willington* 269

EQUITY OF, &c.

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DISSENT.

Dissent from the established religion was not recognised until the Toleration Act. To what extent it was allowed then and since, observed on, by SMITH, M. R. *Evans v. Cassidy* 249-50

DIVIDENDS.

See BONUS.

DOCKETING.

See JUDGMENT.

DOCUMENTS.

See EVIDENCE, I, II.
INJUNCTION.

ECCLESIASTICAL MATTERS.

See GLEBES.

PROFESSION.

EJECTMENT.

See SALVAGE.

ELEGIT.

See CREDITORS' SUIT, 1.
JUDGMENT, 7, 8, 9, 10.

ENROLMENT.

See DECREE, 1, 3, 4, 5.

EQUITABLE MORTGAGE.

See MORTGAGE, IV.

EQUITABLE PROTECTION.

Though trustees are protected in acting under the decision of a competent tribunal, the protection does not extend to persons receiving payments out of a fund for themselves; and though the decision has been long acted on, it is no protection to such persons against the claims of others not bound by it. C. *Foster v. M'Mahon* 287

And See FRAUD AND SURPRISE.

EQUITY OF REDEMPTION.

See MORTGAGE.

SALE UNDER THE COURT, 3, 4.

ERROR.

ERROR.

Suits to vary or alter decrees. *See* BILL, II.

Motions respecting decrees. *See* DECREE, 3, 6.

ESTATE.

Fee-farm. *See* RENT.

Devised. *See* WILL.

ESTOPPEL.

See DISMISS, 1.

EVIDENCE.

I. Admissibility generally.

1. The Poor-law valuation is evidence, as a public document, of the value of land comprised in it. *C. Swift v. M'Tiernan* 602
2. S. P. in a previous decision of Sir E. Sugden. *C. Welland v. Lord Middleton* 603
3. An account stated between a judgment debtor and his creditor, in which the latter admits payments on account, and a balance is struck of the sum due, cannot, after the death of the parties, be made use of in evidence, as an admission against interest, to prove these payments against third persons. *C. Foster v. M'Mahon* 287
4. The general doctrine that the admission of one person is no evidence against another not claiming under him, and the exceptions to the rule in respect of admissions against interest considered, and the cases upon the subject reviewed, by BRADY, L. C. *Ibid* 299, 302
5. The rule that judgments are not evidence except against parties or privies, observed on; and where a judgment of revivor against one estate might be evidence against the owner of another, considered, *per* SMITH, M. R. *Kirkwood v. Lloyd* 565, 573

EVIDENCE.

II. Documents not in issue.

6. Any documents which could be used at law as admissions to prove an agreement pleaded may be used in evidence in equity for the same purpose, though not noticed in the bill; subject to enquiry if the defendant be taken by surprise: but such a mode of proving a case may affect the costs of the suit. *C. Crosbie v. Thompson* 404
7. A document not in issue by the bill, and a motion for the introduction of which by amendment has been refused, cannot be used at the hearing. *C. Swift v. M'Tiernan* 602

III. Competency.

8. A defendant whose interest in the suit is so coincident with that of the plaintiff that he might have been made a co-plaintiff, is nevertheless, under the 6 & 7 Vic. c. 85, a competent witness for the plaintiff. *C. Kelly v. Bennison* 605

IV. Examination, &c., of Witnesses.

9. The rule that a witness who had been examined in chief cannot be examined in aid without the leave of the Court applies only to an examination by the same party. Therefore where a witness who had been examined in chief by the plaintiff, and not cross-examined, was examined in aid by the defendant without an order, the Court refused to suppress the depositions. *R. Bannatyne v. Bannatyne* 359
10. A party examining on personal interrogatories in the Master's office may use as much of the answers as he chooses, without making the rest of them evidence. *C. Brabazon v. Teynham* 475
11. After replication filed in a suit to perpetuate testimony, it is not necessary to obtain an order to examine witnesses. *R. Allen v. Hackett* 355

EVIDENCE.

See also BILL, III (Discovery).

PRESUMPTION.

NOTICE (Effect of order *pro confesso*).

EXAMINATION.

Order for, not necessary in bills to perpetuate testimony. R. *Allen v. Hacket* 355

And *See* EVIDENCE, IV.

EXCEPTIONS.

1. Under the 75th Rule the plaintiff has six weeks to except to the answer to an amended bill for insufficiency. R. *Garvey v. Hayes* 270
2. Where the report of the Master, under an order to take preliminary accounts under the 36th General Order is excepted to, the exceptions are to be brought before the Rolls, and not set down to be heard before the Lord Chancellor. C. *Leech v. Law* 136

EXECUTORS AND ADMINISTRATORS.

1. An executor may act as an attorney under a power from co-executors without incurring liability as an executor; but previous to so acting, he must do something equivalent to a disclaimer. The cases on the liability of a person acting as agent to an executor, observed on, by BRADY, L. C. *Montgomery v. Johnston* 480
2. Jurisdiction to order the personal representatives of a deceased solicitor to deliver up title deeds. R. *Allen Jervoise* 583
3. The plaintiff, an executrix, being also devisee and legatee, the Court made an order that she might sue *in forma pauperis*. R. *Flattery v. Anderson* 586
4. "*Kelly v. The Bank of Ireland* shows that an administration as in case of intestacy becomes void when a will is afterwards found. In that

FRAUD, &c.

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case there were executors appointed by the will, and perhaps that may make a distinction." *Per* BRADY, L. C. *Foster v. M'Mahon*. 305
(*See Bevan v. Lloyd* and *Maguire v. Denham*, 10 Ir. Law Rep. 228, 240).

And *See* ASSETS.
WILL.

EXHIBITS.

See EVIDENCE, I., II.

EXPENDITURE.

Expenditure on the estate claimed, with plaintiff's knowledge, but chiefly in his minority, *Held*, no defence. C. *Scott v. Scott* 487

FEE FARM.

Since the Statute *Quia Emptores* there cannot be a grant in fee-farm. R. *Brady v. Fitzgerald* 55

See further, RENT.

FEME COVERT.

See HUSBAND AND WIFE.

FIRM.

Bequest to. *See* WILL, 15.

FORFEITURE.

See PENALTY.

SALE UNDER THE COURT, 1.
SALVAGE.

FRAUD AND SURPRISE.

1. Securities obtained from the plaintiff for his wife, as a compromise of doubtful rights, but under the threat and apprehension of arrest, and without adequate consideration or advice, set aside. C. *Scott v. Scott* 74
2. The circumstances under which a compromise of doubtful rights will be upheld or will be set aside as improvident and unreasonable, and the elements of decision in such questions, considered, by BRADY, L. C. *Ibid* 95, 98

See also INJUNCTION.

FRAUDULENT AND VOLUNTARY DEEDS.

See DEED, II.

FUND IN COURT.

See ASSETS, 1, 3.

EQUITABLE PROTECTION.
INTERPLEADER, 3.

GENERAL ORDERS.

Issued under Trustees' Act, pp. i., &c.
 Issued respecting recognizances, &c.,
 pp. iv., &c.
 Issued under Incumbered Estates Act,
 pp. vii., &c.

Cases on the construction of the Orders.

- 15th—Notice Parties. C. *Beddy v. Smith* 467
 31st—Subpœna. R. *Johnston v. Tottenham* 271
 33rd—Appearance. R. { *Anonymous* 584
 { *Egan v. Power* 585
 35th—Subpœna. R. *Johnston v. Tottenham* 271
 36th—Preliminary Accounts. C. *Leech v. Law* 136
 50th—Second Amend- } *Garvey v.*
 ment. R. } *Hayes* 270
 75th—Exceptions. }
 82nd—Dismiss. R. *Mark v. Willington* 269
 { C. *Bradley v.*
 { *Davis* 134
 { R. *Heenan v.*
 { *Berry* 587
 102nd—Puisne Incum- }
 brances. }
 137th—Report. R. *Evans v. O'Dell* 340
 139th—Sales in Country. C. *O'Grady v. Brady* 400
 7th Order in Bankruptcy. C. *In re M'Cullagh* 466

GLEBES.

1. Sums to be repaid by succeeding incumbents for glebe improvements can be recovered only by distress, &c., as pointed out by statute 10 W. 3, c. 6; and though several Acts amending that statute speak of these sums as charges, none of them create any claim against the benefice, which

HUSBAND AND WIFE.

can be recovered by bill in equity. C. *Brooke v. Horner* 214

2. The incumbent of a benefice under sequestration was liable to repay instalments for glebe improvements to his predecessor's executor: sums were also ascertained under a commission as due for dilapidations in the time of the predecessor, which were to be set off under the statute 12 G. 1, c. 10. *Semble*, the Bishop could require a moiety of the income received by the sequestrator to be deducted for the dilapidations; but *Semble*, the right of set off is connected with the liability to repay the instalments, which did not apply to the first year's income, and therefore no deduction should be made from it. *Ibid*

HEARING.

Counsel for an incumbrancer, whose charge is stated in the bill, but not proved in the cause, will not be heard against the plaintiff's rights. C. *Dundas v. Blake* 138

See also, SETTING DOWN CAUSE.

HUSBAND AND WIFE.

1. A covenant to pay £100 for the full and sole use of an intended wife during her life, and that the interest or residue remaining at her decease should go to the children of the marriage, makes the fund settled the separate estate of the wife. C. *Arthur v. Arthur* 511
 2. Where a married woman has been supported by her husband no retrospective account is given of her separate estate against his assets, and there is no distinction whether it be pin-money or not, or whether it is secured by articles remaining *in fieri* or an executed trust. *Ibid*
 3. Sequestration may be awarded against the separate estate of a married woman for costs given against her. R. *Keogh v. Cathcart* 280
 4. The cases in which the Court being put in action respecting separate

HUSBAND AND WIFE.

estate makes it pay costs, and in which a married woman having separate estate is not discharged from custody, a debt being unpaid, noticed by SMITH, M. R. *Keogh v. Cathcart* 283, 285

5. "The course in equity is not to proceed against the person of a married woman nor against her estate, but against the rents and profits of her estate; and there is no mode of thus proceeding except by sequestration." *Ibid* 286
6. A bill of interpleader having been filed against husband and wife, separate subpoenas and notices were served under an order for the substitution of service, requiring them to appear and answer at different times. The husband appeared and filed a separate demurrer, which the plaintiff set down to be argued, and afterwards moved to set aside for irregularity. The Court refused the motion and made an order *nunc pro tunc* that the husband and wife should defend separately. R. *Doyle v. Dumoncel* 342

See also, FRAUD AND SURPRISE.
INTERPLEADER.
POWER, II (Jointure).
TRUSTS AND TRUSTEES, 1, 2.

IDIOT.

See LUNATIC.

IMPLICATION.

See WILL, I.

IMPROVEMENTS.

See EXPENDITURE.

INCUMBERED ESTATES ACT. (11 & 12 Vic.)

General orders issued under it,
pp. vii., &c.

1. The Court is not bound to make an order for sale under the Incumbered Estates Act, if it would not decree a sale in a plenary suit. R. *Ex parte Kennedy* 171
- Therefore, where by a deed between father and son, for large consideration from the son, his object being to

INCUMBERED ESTATES, &c. 17

preserve B in the family, the lands of A and B were conveyed to a trustee in trust to sell A in the first instance to pay off incumbrances and debts of the father; and as to B, subject to so much of the debts and incumbrances as should remain unpaid by the sale of A, in trust to raise a certain sum to pay the charges and incumbrances, and subject thereto to the father for life, remainder to the son in fee, the Court refused to make an order for the sale of B on the father's petition, a part of A remaining unsold. *Ibid*

3. Petition dismissed with costs in consequence of the suppression of certain deeds. *Ibid*
4. The decree in a suit by B, a puisne mortgagee, directed that he should redeem A, a prior mortgagee, who had the title-deeds, within six months, or in default that the bill should be dismissed, with costs, against A; that the defendants who ought to do so should pay B the sum found due to her, and the sum directed to be paid by her to A, provided she should have paid same, and in default thereof a sale to pay B and the other reported creditors in their priority, and the sum which she should pay to A. A was not paid off, and after six months had elapsed and the suit stood dismissed with costs as against him, he presented a petition for a sale under the Incumbered Estates Act. *Held*, that as A had possession of the title-deeds, and as the Court had no jurisdiction to order him to lodge the deeds, no sale could be had under the decree, and therefore there was no pending suit within the 67th section of the Act. R. *Ex parte Hutton* 160
5. *Held also*, that the Court had authority to stay B's suit. *Ibid*
6. Form of order on petition of a first incumbrancer under the Act *Ibid*
7. Form of pleading which should be adopted in petitions, directed by SMITH, M. R. *Ibid* 168
8. Form of order for the sale of lands

INCUMBRANCE.

under the Incumbered Estates Act, at the petition of an owner tenant for life, remainder to his first and other sons in tail, remainder to himself in fee, there being no issue, and notice having been served on the surviving trustee to preserve contingent remainders. R. *Ex parte Lord Blayney* 183

INCUMBRANCE.

See CREDITORS' SUIT.
INCUMBERED ESTATES ACT.
JUDGMENT.
MORTGAGE.
SALVAGE.

INFANT AND INFANCY.

1. A fund was vested in trustees in trust to pay the interest to one for life, and after her death to her children. The Court refused, even with the consent of the mother, to advance part of the principal for the maintenance of a minor child, the consent being in another respect objectionable. R. *Walker v. Walker* 329

2. "In no case that I am aware of has the Court permitted a mortgage or assignment of a portion of an estate or interest in remainder belonging to a minor, for the purpose of providing a present maintenance." *Per SMITH, M. R. Ibid* 332

See also WILL.

3. Parliamentary appearances having been entered for minors within the fourteen days specified by the 33rd Rule, the Court amended the side-bar rules and appearances after the fourteen days had elapsed. R. *Egan v. Nolan* 585

4. The Court has no jurisdiction to appoint a clerk in Court to appear and answer for a minor after the fourteen days have elapsed *without* entering the side-bar rule. R. *Anonymus* 584

See also EXPENDITURE.

INFORMATION.

See BILL, IV.

INSOLVENT.

INJUNCTION.

1. A bill by the directors of an Insurance Company stated matters which amounted to a legal defence, and prayed a discovery of said matters, that a policy of assurance might be delivered up to be cancelled, and an injunction to stay an action at law brought on it. The bill was against A, the administratrix of the assured, and B, the assignee of the policy, in concert with whom and by whose directions the bill charged the policy to have been effected, but who was not a party to the action. The Court refused the injunction on the bill as a bill of relief, because it stated facts amounting to a defence at law, or as a bill of discovery, because it prayed relief which the plaintiff could not waive. R. *Anderson v. Dowling* 590

2. "Wherever the illegality or invalidity arises from matter *dehors* the instrument, the Court of Equity will in general entertain a suit for the delivery up of the instrument. On this principle, when a fraudulent policy has been executed, an Insurance Company may file a bill before the death of the assured in order to have it delivered up to be cancelled, and a bill might, under particular circumstances, be filed after the death of the assured. The concurrent jurisdiction of this Court to order a deed to be delivered up to be cancelled does not authorise the Court to grant an injunction to prevent the trial of a legal question in a Court of Law." *Per SMITH, M. R. Ibid* 594

INSOLVENT.

1. A, having passed his bond and warrant to confess judgment thereon to trustees, was discharged as an insolvent under statute 3 G. 4, returning them for the amount in his schedule. Judgment was afterwards entered on the warrant by them, and assigned to new trustees on the old trusts, by a deed to which A was a party. *Held*, that this was in the nature of a new

INSOLVENT.

obligation, and that the judgment was an available security. *C. Ball v. Ball* 370

2. An arrest under a *ca. sa.*, and discharge under the Insolvent Act, is not cause against the appointment of a receiver on the judgment. *R. Mercer v. M'Kee* 322

And See DISMISS, 2.

INSUFFICIENCY.

See EXCEPTIONS, 1.

INSURANCE.

See INJUNCTION.

TRUST AND TRUSTEES, 2.

INTEREST.

1. Orders in lunacy giving the receiver liberty to pay money are not within the meaning of the 27th section of 3 & 4 Vic. c. 105, so as to bear interest. *C. Hoops v. Kingston* 469
2. When payable on portions secured by a term commencing *in presenti*, but the sale of which was postponed during a life, under a complicated settlement. *R. Lloyd v. Massey* 429
3. Amount recoverable; See LIMITATIONS, STATUTE OF, VI.
4. In mortgagee's accounts; See MORTGAGE, II.
5. On purchase-money; See SALE UNDER THE COURT, 6.
6. Of witnesses; See EVIDENCE, III.

INTERPLEADER.

1. By a deed of separation a husband and wife conveyed the wife's property to a trustee in trust to pay an annuity to the husband, and the residue, after payment of her debts, to the wife, and the trustee covenanted to pay the annuity to the husband. The wife afterwards required the trustee not to pay the annuity to the husband; alleging, on the opinion of foreign Counsel, that the marriage was void. The husband brought an action of covenant for the annuity against the

JOINT TENANTS. 19

trustee, who having lodged the amount in bank filed a bill of interpleader against the husband and wife. Demurrer to the bill by the husband allowed with costs. *R. Doyle v. Dumoncel* 342

2. Instances in which interpleader lies, the rule that both defendants must claim the same debt or duty, and where a dealing with one defendant estops the plaintiff, and the cases on these questions, considered by SMITH, M. R. *Ibid* 350, 353
3. An action of covenant was brought against a trustee, who lodged the amount claimed in Court, and filed a bill of interpleader, which was dismissed with costs on demurrer. *Held*, that the trustee was entitled to have the money returned without deducting the costs. *R. Doyle v. Dumoncel* 517

INTERROGATORIES.

See EVIDENCE, IV.

INTESTACY.

See WILL, 7.

ISSUE.

Construction of grafts in which the word occurs. See WILL, I.

JOINT DEBTORS.

See JUDGMENT, VI.

JOINT TENANTS.

Two brothers, who were builders, but not general partners, entered into an agreement with A B to take land and build upon it. The agreement bound A B to advance £1000 to the brothers at different times, as the work should advance, and provided for making a lease at a future time in words which, at law, would create a joint tenancy; and the brothers covenanted to complete the building at a certain time, and to advance the remainder of the money required. One brother engaged in a dispute with A B about the land, and treated the speculation as imprudent. He

sooh afterwards became from absence and insanity incapable of joining in it, until he died, and never took any part in it or advanced any money, the houses being completed by the other brother. *Held*, that the representative of the deceased brother had no equity to claim a share in the houses, and that the right of survivorship should not be interfered with. *C. Reilly v. Walsh* 22

JOINTURE.

See POWER, II.

JUDGMENT.

I. *Priorities—Docketing—Registry.*

1. Since statute 3 & 4 *Vic.* c. 105, judgments of the same Term, entered after its passing, have priority *inter se* as charges on lands, according to the true dates of their entries. *C. Borough v. Williamson* 1
 2. *Quere* as to the priority *inter se* of such judgments entered before the passing of that Act. *Ibid*
 3. Doubted whether a judgment of the Court of Exchequer, containing upon the face of the record evidence that it could not in fact have been entered on the first day of the Term, must not necessarily be considered as a judgment entered subsequently to one of the same Term in another Court. *Per RICHARDS, B. Ibid* 18
- [Both the latter points have been since ruled, deciding that the judgments have equal priority].
4. The objects of the Docketing Acts and the mode in which they are practically acted on in the entering up of judgments in the different Courts, explained by *RICHARDS, B. Ibid* 8, 10
 5. Differences in the state of the law in England and Ireland at the passing of the statute 3 & 4 *Vic.* c. 105 and the analogous English statute, and its consequences, observed on by *RICHARDS, B. Ibid* 11, 12
 6. Cases in which, before it, priority

was given to judgments *inter se*, observed on. *Ibid* 17

7. *Semble*—The registration of a judgment under the 7 & 8 *Vic.* c. 90, gives no priority as between judgment creditors, except for the protection of heirs and personal representatives in the administration of assets. *R. O'Brien v. Scott* 63

On appeal a case to a Court of Law was offered. *C.* 459

8. The cases deciding that the Act of *W. & M. (Eng.)*, and 3 *G.* 2, c. 7 (*Ir.*), do not apply as between two judgment creditors, unless for the protection of heirs and personal representatives, considered and observed on, by *SMITH, M. R. O'Brien v. Scott* 68–72
 9. A obtained a judgment in Trinity Term 1845. B obtained a judgment in Trinity Term 1846. A sued out an elegit, the inquisition on which was returned and filed on the 20th of July 1846, and went into possession of the lands extended. B's judgment was registered in September 1846; A's in February 1847. *Held*, that A's judgment had priority. *Ibid* 63
 10. "I find nothing in the language of the 7 & 8 *Vic.* to justify me in holding that the registration of a judgment can defeat an estate in the lands prior in fact to the registration of such judgment, and prior by relation to the judgment itself so registered. A judgment creditor who has extended lands under an elegit is not a purchaser for valuable consideration so as to hold discharged of a prior equitable mortgage, of which he had no notice; but in this case the judgment obtained by the petitioner was subsequent to the judgment on which the elegit issued." *Per SMITH, M. R. Ibid* 67
- Same case on appeal. *C.* 459
- II. *Revivor.*
11. Judgments were obtained against G. R., who was seised of the lands

of A and X; the lands of X were conveyed to a purchaser, and afterwards the judgments were revived against the heir of G. R. and the terre-tenants of A. *Held*, that the revivor did not give a new present right against the lands of X. R. *Kirkwood v. Lloyd* 561

12. *Martin v. McCausland*, observed on, and disapproved of. *Ibid*

13. The authorities that a judgment binds only parties to it or privies in estate or by representation applied to the argument that the revivor against the owners of an estate which had belonged to the conusor might affect the owners of another such estate, and the cases in which a different doctrine is supposed to have been applied to the Statute of Limitations, observed on and explained, by SMITH, M. R. *Ibid* 565, 570

14. "A man is not to hunt through every settlement of an estate before he can revive a judgment. The estate was bound by the revivor against the terre-tenants and all persons having equitable interests in it." *Ibid* 571

And See observations. *Ibid* 569, 570

15. Cases put in which a judgment of revivor against one denomination may be evidence against the terre-tenants of another denomination, by SMITH, M. R. *Ibid* 573

And See *Infra*, VI.

III. Statute of Limitations, Arrears of Interest.

16. See LIMITATIONS, STATUTE OF, II., V., VI., 16.

IV. Judgment Acts.

17. Receiver appointed on a judgment notwithstanding a voluntary deed executed the same day as the judgment was entered, the judgment having relation back to the first day of the preceding Term. R. *Beamish v. Phaire* 559

18. An arrest under a *ca. sa.*, and discharge under the Insolvent Act, is

not cause against the appointment of a receiver on the judgment. R. *Mercer v. McKee* 332

19. As to the practice respecting receivers and petitions; See RECEIVER.

And See *Infra*, VI.

V. Suits for Sale.

20. In a suit to raise a judgment after the death of the conusor, seeking the usual accounts of his real and personal estates, it was never necessary, previous to the suit, to sue out an *elegit*. C. *Foster v. McMahon* 287

21. The saving in the 22nd section, 3 & 4 Vic. c. 105, of the rights of incumbrancers prior to the 1st of November 1840, is solely for their protection; and therefore in a suit by a judgment creditor for a sale of the conusor's lands in his lifetime, he cannot rely on the existence of such incumbrances if the owners of them do not object. C. *Kieran v. Corr* 514

22. Right of a judgment creditor who has made salvage advances for head rent to maintain a suit for a sale of the lands in the debtor's lifetime, as against a remainderman under a deed prior to 1840. C. *Fetherstone v. Mitchell* 35

VI. Joint Judgments.

23. Joint judgment against A, B and C; A was the principal, and B and C sureties. A dies; judgment revived against B and C; C was the heir-at-law of A, but the revival was against him as one of the surviving conusors and not as heir. The Court appointed a receiver on petition over the lands which had come to C by *quasi* descent from A, the principal debtor. R. *Mercer v. McKee* 322

24. *Semble*, as a general rule, where there is a joint judgment, and all the conusors are principal debtors, and one of the conusors dies, the Court will not appoint a receiver over the lands of the surviving conusors alone.

The judgment ought to be revived against the surviving conusors and the heir and tertenants of the deceased conusor, and the Court should appoint a receiver over the lands of the heir and tertenants of the deceased conusor as well as over the lands of the survivors, in order to enforce contribution. R. *Mercer v. M'Kee*

322

25. The doctrine at law respecting executions against surviving judgment debtors and the mode of obliging the creditor to make the lands of all contributory, stated. *Ibid*

324-7

VII. Release.

26. The decision of the Common Pleas in *Handcock v. Handcock* (10 Ir. Law Rep.), on the effect of a release of part of the debtor's lands from a judgment in discharging his other lands, doubted. C. *Handcock v. Handcock*

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And See **INSOLVENT**, 1.

JURISDICTION.

I. Generally.

1. A rent reserved on a grant in fee, if accompanied by a power of distress, is a rent-charge, and as such, a bill will lie for recovery of it. R. *Brady v. Fitzgerald*
2. The progress of the jurisdiction in entertaining bills for rent-charges observed on, by SMITH, M. R. *Ibid*
3. Jurisdiction to entertain a bill by the Commissioners of Donations (instead of an information) to remove a trustee for personal unfitness, sustained on the ground that any party who is entitled to sue for a fund misapplied may call on the Court to protect that fund against misapplication, by BRADY, L. C. *Commissioners of Charitable Donations v. Archbold*
4. When a statute in giving a new right also prescribes the mode of enforcing

55

58, 59

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LEGACY, &c.

it, no other remedy can be pursued. Therefore sums to be repaid by succeeding incumbents for glebe improvements can be recovered only by distress, &c., as pointed out by stat. 10 W. 3, c. 6; and though several Acts amending that statute speak of these sums as charges, none of them create any claim against the benefice which can be recovered by bill in equity. C. *Brooke v. Horner*

214

II. Parties out of the jurisdiction.

5. *Semble*, where an order is made under the general authority of the Court, to substitute service on the solicitor of a defendant, such defendant residing out of the jurisdiction, the service is to be considered a service within the jurisdiction, and the defendant must appear and answer within the time limited by the 31st General Order, as mentioned in the notice. R. *Johnston v. Tottenham*
6. Replication should not be filed against parties against whom process is prayed when they come within the jurisdiction. R. *Stephens v. O'Shaughnessy*

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LACHES.

Delay, however great, in the progress of a suit cannot deprive the plaintiff of rights which existed at the time of its commencement. C. *Foster v. M'Mahon*

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See also **EQUITABLE PROTECTION.**
EXPENDITURE.
LIMITATIONS, STATUTE OF.

LANDLORD AND TENANT.

See **RENT.**
SALVAGE.

LEASEHOLD.

See **SALE UNDER THE COURT, I.**

LEGACY—LEGATEE.

See **ASSETS.**
WILL.

LIEN.

LIEN.

See SOLICITOR AND CLIENT.

LIMITATIONS, STATUTE OF.

I. *Trusts or Charges.*

1. A devise of lands to A for life, subject to all the testator's just debts, legacies and funeral expenses, with a bequest of his personal property to A, the better to enable her to pay his debts, &c., does not prevent a judgment debt of the testator from being barred by the 40th section of statute 3 & 4 W. 4, c. 27, or create a trust for the creditor within the 25th section. C. *Dundas v. Blake* 138
2. The distinction between charges on lands and trusts for debts considered, and the several cases on their effect in reference to the Statute of Limitations reviewed. *Ibid*
3. "I cannot find any satisfactory authority, that a devise to a party intended to take beneficially, subject to the debts of the deviser, without more, constitutes that description of trust as between the creditors and the devisee to except the charge from the 40th section. Whatever may be my own opinion as to the question, whether in the case of a clear and express trust for a definite sum of money the demand is properly within the 25th section, I do not think it necessary to go into that question; it may, I apprehend, be found that the position that it is has been rather too strongly inferred as settled by authority against the plain words of the enactment." Per BRADY, L. C. *Ibid* 158
4. "In all the cases where the demand was held not barred, there were trustees having an estate separate from the beneficial interest in the land, and that estate was not barred." Per BRADY, L. C. *Ibid* 149
5. Under the earlier Statutes of Limitation a charge brought the debt out of the condition of a demand affected by the statutes into that of a right as

LIMITATIONS, &c. 23

against which no statutable limitation was in force. This does not now apply, and why, explained, by BRADY, L. C. *Ibid* 145-6

II. *Payments, Acknowledgments.*

6. An account stated between a judgment debtor and his creditor, in which the latter admits payments on account, and a balance is struck of the sum due, cannot, after the death of the parties, be made use of in evidence, as an admission against interest, to prove these payments against third persons, so as to prevent the bar of the statute. C. *Foster v. M'Mahon* 287
7. Interest on judgments was paid by those entitled to lands of A, charged with it, until 1805, when the judgments were assigned to a trustee for B. and M., who were tenants for life of the lands of A. No interest was actually paid from 1805 to 1837, when the judgments were again assigned. *Held*, that B. and M. being the parties bound to pay the interest, and also beneficially entitled to it, there was in contemplation of equity a payment of interest from 1805 to 1837, which saved the bar of the statute as against the lands of X. R. *Kirkwood v. Lloyd* 561
8. "The result of the decision of *Warrens v. O'Shea* is, that a payment on foot of a debt by any person liable thereto, is a payment which will take the case out of the statute as against every person also liable to the debt, whether standing in privity or not. The cases in England establish that the payment, in order to affect another person liable to the same debt, must be by a person expressly or impliedly authorised to make the payment on behalf of the person sought to be affected thereby." Per SMITH, M. R. *Ibid* 574-6

III. *Where the statute is inapplicable.*

9. A, upon the marriage of his daughter, charged by deed in 1793 upon lands a sum of money, which by the

same settlement was assigned to trustees, to permit the husband and wife to receive the interest during their lives, and after their decease to pay the principal amongst the children, as the parents or survivor of them should appoint. There was no clause empowering the trustees to give discharges. The surviving parent died in 1845. No payments appeared to have been made by the owner of the lands subsequent to 1826. *Held*, that the charge was not barred by the Statute of Limitations, there being no person capable of giving an effectual discharge for the principal until the death of the surviving parent. *C. McCarthy v. Daunt* 29

10. "In order to bring the case within the operation of the statute, there must be a power in the person who is to receive the payment also to give an effectual release." By *MOORE, L. Com. Ibid* 33

IV. Pending suits.

11. Judgments of 1810 revived in 1845 and 1846. Bill filed in 1823, and decrees in 1834 directing an account of incumbrances and in 1836 for a sale. After an order of reference to allocate the funds, the person entitled to the judgments obtained leave to prove them and make up a separate report, on an affidavit, stating that he never was informed of the existence of the suit or the decrees, or that one of the decrees enabled the creditors to prove thereunder, until very lately, and that he was not aware of the scope and effect of the decree until a few days before. He filed a charge in April 1846. *Held*, that the suit and decrees did not save the bar of the Statute of Limitation. *R. Hutchins v. O'Sullivan* 443

V. Revivor of Judgments.

12. "There is no doubt that the revivor creates a new right against the conusor and fixes a new terminus from which the twenty years were to run, and is binding on privies in estate and by

representation." By *SMITH, M. R. Kirkwood v. Lloyd* 569

13. Judgments were obtained in 1738 against G. R., who was seised of the lands of A and X. In 1786 the lands of X were conveyed to a purchaser. In 1840 the judgments were revived against the heir of G. R. and the tenants of A. *Held*, that the revivor did not give a new present right against the lands of X to save the bar of the Statute of Limitations. *R. Kirkwood v. Lloyd* 561

And See VI.

VI. Interest.

14. Judgments were revived on a *sci. fa.* of 1844; and a charge under a decree filed to prove them in 1846. *Held*, that the "action or suit" by which the arrears of interest "shall be recovered" under section 42, was the charge, and not the *scire facias*; and therefore that the party was entitled to six years' interest from the filing of the charge only. *R. Hutchins v. O'Sullivan* 443
15. "In *Brady v. Fitzgibbon* it was decided that where a receiver was appointed under the Sheriffs' Act, six years' interest was recoverable prior to the issuing of the *scire facias*; but the ground of that decision was, that the appointment of the receiver under that Act was an equitable execution." By *SMITH, M. R. Ibid* 449

VII. Other matters.

16. Proceedings to a custodiam, under which, however, no money was received, irregularly taken by a person equitably entitled to a judgment (under an assignment, no memorial of which was ever registered), are sufficient to prevent the bar of the statute 8 G. 1, c. 4, set up in a suit afterwards instituted by the same person to recover the judgment. *C. Foster v. M'Mahon* 287
17. *Quære* if a tenant for life of an equitable estate gets in the legal

LIMITATIONS, &c.

estate, may the Statute of Limitations be used in ejectment, to the prejudice of the remainderman, relying on that legal estate in his character of heir-at-law. By BRADY, L. C. *Scott v. Scott* 508-9

18. *Quære* if there be any limitation for the time of filing a bill of revivor? C. *Foster v. M'Mahon* 287, 307

LIS PENDENS.

See EQUITABLE PROTECTION.

LACHES.

LIMITATIONS, STATUTE OF, IV.

LIVING.

See GLEBES.

LUNACY—LUNATIC.

1. A payment out of accumulated rents to a lunatic's son, tenant in tail in remainder, to furnish the mansion-house, in which he lived, refused; but a sum allowed for repairs, it being found to be beneficial to the estate that the son should continue to inhabit it. C. *Ex parte Tottenham* 414
2. Orders in lunacy giving the receiver liberty to pay money are not within the meaning of the 27th section of 3 & 4 Vic. c. 105, so as to bear interest. C. *Hoops v. Kingston* 469
3. Form of order on motion to take bill as confessed against a person alleged to be of unsound mind. R. *Swift v. Swift* 557
4. Discharging and passing final account of receiver, who has become insane. R. *Webb v. Cashel* 558

MAINTENANCE AND EDUCATION.

See DEED, 1 (construction).

INFANT, 1, 2.

WILL, II.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER'S REPORT.

See next title.

MORTGAGE.

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MASTER'S OFFICE.

This Court has power on motion to review a report confirmed by the operation of the 137th General Order. R. *Evans v. O'Dell* 340

See also CREDITORS' SUIT, 8, 9.

EVIDENCE, IV.

EXCEPTIONS, 2.

LIMITATIONS, STATUTE OF, IV, VI.

RECEIVER, I, IV.

SALE UNDER THE COURT.

MEARINGS.

See BOUNDARIES.

MINOR.

See INFANT.

MISTAKE.

See DECREE, 3.

EQUITABLE PROTECTION.

FRAUD AND SURPRISE.

MONKS.

See PROFESSION.

MORTGAGE.

I. Generally.

1. A, being in prison as an insolvent, assigned to B a leasehold interest, for a sum of money which discharged all A's debts, including debts to B and head rent, but was less than the value. The deed purported to be an absolute sale, but there was an indorsement that if A paid B, upon a day named, the purchase-money and costs and all expenses of cropping the farm, B would re-assign the lands and the deed should be void. B also a few days after gave a bond to surrender the premises if paid on the day. The same attorney acted for both parties. *Held*, under the circumstances, that the transaction was a mortgage and not a conditional sale. C. *Fee v. Cobine* 406

II. Accounts.

2. It is the settled practice of this Court, in taking accounts against

mortgagees in possession, to make half yearly rests, and not to charge against the mortgagee interest on payments exceeding the interest due to him received at any intermediate periods, no matter how frequently the payments are made. *C. Graham v. Walker* 415

III. Mortgage Act.

3. Where a petition is presented under the Mortgage Act, the mere impeachment of the mortgage by affidavit, without showing probable grounds for such impeachment, is not sufficient to prevent the Court from making the usual reference to appoint a receiver. *R. Whaley v. Whaley* 276
4. *Semble*, if a bill should be filed to impeach the mortgage, the Court would not distribute the fund received by the receiver until such suit was disposed of. *Ibid*
5. A mortgagee having obtained a conditional order for a receiver under the Mortgage Act, payments were made on account of interest, and a receiver was appointed by a judgment creditor. A petition being presented by the mortgagee, the conditional order was made absolute, and the receiver extended to the mortgage, in chamber. On an affidavit stating the intermediate payments, the order was set aside. *C. Goldsmidt v. Glengall* 608
6. A judgment creditor having a receiver is not entitled to notice of a petition by a mortgagee to extend him to the mortgage. *Ibid*

As to practice respecting receivers; *See RECEIVER.*

IV. In Bankruptcy.

7. The 7th General Order in Bankruptcy applies to equitable mortgages. *C. In re McCullagh* 466

V. Other matters.

8. Practice and rights of mortgagees in

creditors' suits, and whether there can be a sale subject to a mortgage; *See CREDITORS' SUIT*, 4, 5, 6, 7.

And *See PENALTY.*

MOTION.

See APPEAL.

NEXT-OF-KIN.

See BILL, 2 (Parties).

NOTICE.

A bill by a judgment creditor to have the benefit of a renewal to A, and set aside a sub-lease to B, who sold to the defendant X, stated circumstances of express notice to A and B. The bill was taken as confessed against A and B. The defendant X denied notice to them, and it was not proved. *Held*, that there could not be a decree against him. *C. Kelly v. Magee* 383

On sale of leasehold; *See SALE UNDER THE COURT*, 1.

NOTICE PARTIES.

See BILL, 2 (Parties).

NUN.

See PROFESSION.

OBJECTIONS TO TITLE.

See SALE UNDER THE COURT, I.

OCCUPATION.

See PRESUMPTION.

ORDERS.

See GENERAL ORDERS.
LUNACY, 2.

PARLIAMENTARY APPEARANCE.

See APPEARANCE.

PARTIES.

See BILL, I.
EVIDENCE, III.

PARTITION.

PARTITION.

1. Bill stating that the lands of B, part containing one hundred and fifty-nine acres, and part forty-six acres, were, previous to 1794, held by the same tenants, so that the boundaries became confused: that in 1804 A was seised in fee of the one hundred and fifty-nine acres and held the forty-six acres under a lease from X for a term; that the mearings of the forty-six acres had not since been ascertained, the entire being, as they had been for one hundred years before, held by the same persons who were owners of the fee-simple lands; that they had been so mixed up, that it was impossible to discover the boundaries, or to ascertain where the forty-six acres were situated. The bill, after deducing the title of the plaintiff from A, stated that the defendant claimed to be entitled to the forty-six acres as assignee of X, and that the plaintiffs' interest under the lease had determined, and prayed a partition or a commission to ascertain the boundaries. *Held*, on demurrer, that it could not be sustained for a partition, as no title to a partition at law was shown, nor as a bill to ascertain boundaries. *R. O'Hara v. Strange*

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2. A partition will be decreed in equity only where the plaintiff would be entitled to a partition at law. *Ibid*

PARTNER—PARTNERSHIP.

Rights of survivorship; *See* JOINT TENANTS.

Bequests to firm; *See* WILL, 15.

PAUPER.

The plaintiff, an executrix, being also devisee and legatee, the Court made an order that she might sue *in forma pauperis*. *R. Flattery v. Anderdon*

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PENALTY.

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PAYMENTS.

See EQUITABLE PROTECTION.

PENALTY.

1. By deed (reciting that A was indebted by judgment to X in £3000, and A's inability to pay, and an agreement by X to accept £700 in lieu of the £3000, if punctually paid, to be secured by B) B mortgaged his property to secure the £700; to be payable by instalments at certain times; and the deed provided that if the instalments should not be punctually paid X should be remitted to his original rights against A, as well as have the security of the deed for £700. By a cotemporaneous deed the judgments were assigned to a trustee, for X in case of default in punctual payment of the £700, and on payment of the £700 for A and B. By a prior deed A mortgaged his property to B for other debts, and as a counter-security. Default was made in payment of the instalments, and the plaintiff (X's assignee) claimed the entire £3000. *Held*, that although the Court would not interfere for A if the arrangement were between him and X only, yet, as the rights of B were involved, the condition in default of punctual payment should be treated as a penalty and relieved against, and this equity could be enforced by A as well as by B. *C. Carroll v. O'Connor; Pike v. O'Connor*

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2. "The equity (to relief against a penalty) may be enforced as well in favour and at suit of the principal as the surety. All persons affected by the arrangement have the same equity, and the debtor himself has a right to claim the benefit of it. It is the general course of the Court to relieve against a penalty, and the exception to that is where the transaction to which the penalty is attached is purely voluntary." *Per* BRADY, L. C. *Ibid*

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PENDING SUITS.

PENDING SUITS.

See **EQUITABLE PROTECTION.**
LACHES.

LIMITATIONS, STATUTE OF,
IV.

PERPETUATE TESTIMONY.

See **EVIDENCE, 11.**

PERSONAL INTERROGATORIES.

See **EVIDENCE, 10.**

PIN-MONEY.

See **HUSBAND AND WIFE.**

PLEA.

See **DISMISS, 1.**

PLEADING.

See **BILL.**

DECREE.

DEMURRER.

REPLICATION.

POOR-LAW.

The poor-law valuation is, as a public document, evidence of the value of lands comprised in it. *C. Welland v. Lord Middleton* 603

Followed in *Swift v. M'Tiernan.* *C.* 602

PORTIONS.

See **DEED, I (Construction).**

POWER, I (Appointment).

POWER OF ATTORNEY.

See **EXECUTORS, 1.**

TRUSTEE.

POWERS.

I. *Appointment.*

1. Three policies of insurance on the settlor's life were assigned by a voluntary deed on trust for A, B and his other children in such shares, &c., as he should appoint. He, on A's marriage, appointed £2000 out of the several sums secured by the policies to her. He made a similar appointment on B's marriage. By his will he appointed £2000 to each of the

POWERS.

other children. Two of the policies having dropped before his death, *Held*, that the sums given to A and B should be paid in full according to the priorities of the appointments, and the entire loss fall on the other objects. *C. Borough v. Close* 391

2. A sum of £8000 was bequeathed in trust for E. for her separate use for life, and at the decease of E. that two-thirds of the sum should be and remain for the use of the child and children of the said E., and the remaining third thereof she should be at liberty to dispose of by her last will and testament; and failing such disposition, that the said remaining third should go to the use and benefit of the said child or children in equal proportions. By a settlement, executed upon E.'s marriage, she, according to her right and interest therein, and in consideration of the marriage, assigned to trustees the said sum of £8000 in trust, after the decease of the survivor of E. and her husband, in case there should be issue of the marriage one or more children, to pay it over among such issue as they should by deed or will appoint; and in default of appointment, to the issue in equal shares; and E. covenanted for further assurance. There were two children of the marriage. E. by her will, in virtue of the power and authority given her by the will of her father, and of all other powers and authorities enabling her in that behalf, devised and bequeathed one-third of said sum of £8000 in trust to pay two legacies to strangers; and as to the residue of said one-third, in trust for the use of one of the children, whom she also appointed residuary legatee. *Held*, that the will of E. was an ineffectual appointment of the one-third so far as it was inconsistent with the trusts of the settlement, and therefore the appointment of the two legacies to strangers was void; but that the appointment of the residue to the child of E. was valid. *R. In re Chambers* 518

POWERS.

3. "That an appointment is not void as to the objects of the power, where a portion of the fund is appointed to strangers, is clear." By SMITH, M. R. *In re Chambers* 524
4. Costs of appointees in suits against the estate charged. C. *Hoops v. Kingston* 471

II. Jointuring.

5. A power was given by will to successive tenants for life to limit a rent-charge "for any woman or women whom they may respectively marry," by way of jointure and in bar of dower, "to be in proportion to the marriage portion they shall respectively receive with their respective wife or wives; i. e., £100 jointure for every £1000 they shall so actually receive as a marriage portion with their respective wife or wives, if they shall so think fit," not to exceed £500; "such grant, limitation or appointment to be made either before or after marriage." *Held*, that the wife of a tenant for life, who afterwards came into possession, but who had been married previous to the will, was not an object of the power, there being no grounds from the rest of the will for giving a past meaning to the words of futurity; and *Semble*, that money of the wife which had been settled to her separate use, with remainders to the husband and children of the marriage, was not "received" by the husband within the meaning of the power. C. *Dillon v. Dillon* 423

III. General points.

6. The donee of a power, although to be executed by will only, may bind himself not to execute it, or not to execute it except under certain restrictions. R. *In re Chambers* 518

PRACTICE.

See ABATEMENT, ACCOUNT, AMENDMENT, ANSWER, APPEAL, APPEARANCE.

PRACTICE.

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CONSENT, CONTEMPT, COSTS, CREDITORS' AND ADMINISTRATION SUITS.

DECREE, DISMISS.

EVIDENCE, II, IV., EXCEPTIONS.

GENERAL ORDERS.

HEARING, HUSBAND AND WIFE, 2, 3, 4, 5, 6.

INCUMBERED ESTATES ACT, INFANT, INJUNCTION, INTERPLEADER, 2, 3.

JUDGMENT, IV., V., JURISDICTION, II.

LUNACY.

MASTER'S OFFICE, MORTGAGE, III, IV.

PAUPER, PRO CONFESSO.

RECEIVER, RE-HEARING, REPLICATION.

SALE UNDER THE COURT, SCIRE FACIAS, SECURITY FOR COSTS, SEQUESTRATION, SETTING DOWN CAUSE, SOLICITOR, SOLICITOR AND CLIENT, SUPPLEMENT.

PRAYER.

See BILL, II., III.

PRELIMINARY ACCOUNTS.

See ACCOUNTS, 1, 2.

PRESUMPTION.

At law the owner of lands is *prima facie* to be presumed to be the occupier of them. By SMITH, M. R. *O'Hara v. Strange* 267

PRINCIPAL.

See BONUS.

INFANT.

PRINCIPAL AND SURETY.

Judgment against; See JUDGMENT, VI (Joint judgment).

When strict performance of arrangements is dispensed with, third parties intervening; See PENALTY.

And See RECEIVER, V.

PRIORITIES.

PRIORITIES.

Among judgments; *See* JUDGMENT, I.

Among objects; *See* POWER, 1 (Appointment).

Under voluntary deed; *See* DEED, 2.

PRO CONFESSO.

1. Form of the order on motion to take the bill as confessed against a defendant alleged to be of unsound mind. R. *Swift v. Swift* 557
2. Decree *pro confesso* against a defendant, although the plaintiff was in contempt when the cause was set down, the costs having been paid before the decree was pronounced. R. *Casey v. Casey* 327
3. Opening enrolment, and letting in defendant to answer after decree; *See* DECREE.
4. Effect of bill *pro confesso* against debtor when purchaser from him denies notice charged by the bill; *See* NOTICE.

PROFESSION.

1. The doctrine of civil death by profession ceased to be law at the Reformation, and was not revived by the Roman Catholic Emancipation Act (10 G. 4, c. 7). Therefore the Court granted a receiver, on a bill filed to raise the arrears of an annuity devised in trust for a lady, who afterwards became a nun, during such period of her natural life as she should continue unmarried. R. *Evans v. Cassidy* 243
2. The various authorities on the subject of civil death reviewed, and the peculiarities of the old law inapplicable now, observed on by SMITH, M. R. *Ibid* 248, 252

PROMISSORY NOTE.

See SALE UNDER THE COURT, 7.

PROTECTION.

See EQUITABLE PROTECTION.

RECEIVER.

PUBLIC DOCUMENTS.

See EVIDENCE, 1, 2.

PUISNE INCUMBRANCES.

See CREDITORS' SUIT, 8, 9;
INCUMBRANCES.

PURCHASER—PURCHASE-MONEY.

See CONDITIONAL SALE.
SALE UNDER THE COURT.

RECEIVER.

New General Orders, respecting, p. iv.

I. *Appointment of, generally.*

1. The appointment of a person as receiver over a kind of property the management of which he does not understand, with an undertaking to act under the direction of a person who does understand it, is improper. C. *Lupton v. Stephenson* 484
2. The appointment of a receiver who acts under the directions of a defendant is objectionable. *Ibid*
3. A reference to appoint a receiver sent back to the Master, though the Master's selection had been affirmed by the Master of the Rolls. *Ibid*

II. *Extending Receiver.*

4. The extension of a receiver in an abated suit against a tenant for life, after his death, to a suit by a creditor on the inheritance, is not irregular. C. *Moore v. Donegal* 412
5. On motions to extend receivers, the only persons entitled to be heard are the petitioner and the debtor, and not the parties who have appointed or previously extended the receiver. C. *Walsh v. Walsh* 607
6. A judgment creditor having a receiver is not entitled to notice of a petition by a mortgagee to extend him to the mortgage. C. *Goldsmidt v. Glengall* 608
7. The petitioner in the second matter was receiver in the first. The

RECEIVER.

Court refused to extend him to the second matter, though the respondent consented. R. *Harvey v. Wallace* 339

III. On Judgments or Mortgages.

8. For questions under the Judgment Acts; See JUDGMENT, IV., and under Mortgage Act; See MORTGAGE, III.

IV. Allocation of Rents.

9. Rents received by a receiver after the gale day next succeeding the lodgment of the three-fourths of the purchase money by a purchaser of lands under a decree are applicable, first to the payment of solvent arrears, and then to the rent due to the purchaser, whether or not he has gone into possession, or the purchase deed has been executed. R. *Doorley v. Power* 577
10. Practice in framing objections to the Master's report allocating rents so received. *Ibid*
11. Certificate of the Masters as to the practice in various cases respecting rents received after a sale. *Ibid* 579-80
12. Lord D. was tenant for life of certain estates, subject to a charge on the inheritance vested in S. A bill was filed by Lord D.'s own creditors and a receiver was appointed over the estates. S. filed a bill to raise his charge. Lord D. died in October 1844; and S. obtained an order in January 1845, that the receiver should be extended to S.'s cause so far as related to the rents due at the time of the decease of Lord D., and then remaining uncollected. A sum being in the receiver's hands consisting of rents due in Lord D.'s lifetime; *Held*, that the creditors of Lord D.'s life estate were entitled to the rents received before, and S. to the rents received after the order of January 1845. C. *Moore v. Lord Donegal* 412
- Affirming the decision at the Rolls. R. S. C. 364

REHEARING.

31

V. Discharge, Sureties.

13. A receiver who had passed his final account and paid in the balance found against him, and who had been acting for thirty years, discharged without paying the costs of his removal, or of the appointment of a new receiver. R. *Cox v. M'Namara* 356
14. The receiver being insane, the Court made an order that his surviving surety might pass the account and that, on the balance being lodged, the recognizance should be vacated, and gave the surety the costs of the motion, and of vacating the recognizance. R. *Webb v. Cashell* 558
15. A receiver's sureties are not liable beyond the amount of the recognizance. The sureties having paid the amount of the recognizance into Court; *Held*, that they were not liable to the costs of removing the receiver who was in default, and of appointing a new receiver, nor to the costs of a *sci. fa.* against themselves or their principal. R. *Watters v. Watters* 334

RECOGNIZANCE.

General Orders respecting, p. iv.

See RECEIVER, 15.

SCIRE FACIAS, 1.

REDEMPTION.

See CREDITORS' SUIT, 4-7.

PENALTY.

SALVAGE.

REFUNDING.

See ASSETS, 1, 2.

REGISTRATION.

See JUDGMENT, I.

RE-HEARING.

The rule against re-hearing an appeal motion is not inflexible; but it is a sufficient ground for refusing it that the case has been already anxiously considered. C. *Langford v. Mahony* 319

RE-HEARING.

For what variations of decrees a re-hearing is necessary; *See* DECREE, 6.

RELEASE.

See JUDGMENT, VII.

RELIGIOUS VOWS.

See PROFESSION.

REMAINDER.

See WILL, I (Implication).

REMEDY.

See JURISDICTION.

RENT.

1. Since the Statute of *Quia Emptores* there cannot be a grant in fee-farm. A rent reserved on a grant in fee, if accompanied by a power of distress, is a rent-charge, and as such a bill will lie for recovery of it. *R. Brady v. Fitzgerald* 54

2. The nature of the relation created by a grant reserving a rent, but no reversion, as to the landlord's remedies, observed on, by *SMITH, M. R. Ibid* 60, 61

3. The same points re-considered. *R. Pennefather v. Stephens* 61

But *See Brady v. Fitzgerald*, on appeal, reported *post*, vol. 12.

See also RECEIVER, IV. (Allocation).
SALVAGE.

REPLICATION.

The replication should not be filed against persons against whom process is prayed only when they come within the jurisdiction. *R. Stephens v. O'Shaughnessy* 279

REPORT.

See MASTER'S OFFICE.

REPRESENTATIVE.

See EXECUTORS AND ADMINISTRATORS.
WILL, 15.

REVERSIONARY TERM.

See DEED, I (Construction).

SALE, &c.

RESTS.

See MORTGAGE, II (Accounts).

REVIEW.

See BILL, II.

MASTER'S REPORT, 1.

REVIVOR.

Of suits; *See* ABATEMENT, 1.

Of judgments; *See* JUDGMENT, II.

LIMITATIONS, STATUTE OF, V, VI.

REVOCATION.

See DEED, 2, 4.

WILL, III.

ROMAN CATHOLICS.

See PROFESSION.

SALE.

See CONDITIONAL SALE and next title.

SALE UNDER THE COURT.

I. Title.

1. A purchaser of a leasehold under a decree is affected with notice of all clauses in the lease; but he has a right to assume that the premises are lawfully in the condition in which they are sold; and therefore when a lease contained a clause of forfeiture for the exercise of a trade, which was that carried on on a part of the premises comparatively of little value for any other business; *Held*, a ground for discharging the purchaser, though he had been some time in possession, and there was a waiver by the landlord for the time past. *C. Spinner v. Walsh* 597

2. Observations showing why the above was not a case for compensation, and why it would not be sufficient to evict the tenant, by *BRADY, L. C. Ibid* 600, 601

3. Whether the Court will sell, subject to incumbrances, considered, and whether possession of the deeds makes any difference, *quære* ? by *SMITH, M. R. Ex parte Hutton* 163, 166, 167

4. *Seemle*, this Court will sell an estate subject to incumbrances. C. *Kieran v. Corr* 514
5. A purchaser under a decree is not bound to make his objections to the title in any particular order. C. *Spinner v. Walsh* 597

II. *Purchase-money.*

6. A sum not exceeding the interest of the purchase-money, or the rents of the estate, paid to the purchaser when the money had been lodged three years, but the title was not yet completed. R. *Piers v. Piers* 358
7. The Court refused to allow a purchaser to lodge his promissory note in lieu of the three-fourths of his purchase-money, upon the allegation that there would be a large surplus, and the inheritor consenting, notice not having been given to all the creditors. R. *Gardiner v. Blesinton* 357

III. *Biddings.*

8. Whether a defendant who has not the carriage of a decree may bid at the sale in the Master's office without an order permitting him to do so? *Quere.* R. *Munns v. Feris* 253
9. Leave to the plaintiff to bid at the sale, without taking from him the carriage of the decree, where he was the first incumbrancer, and the property clearly insufficient to pay his demand. R. *Steele v. Devonport* 339

IV. *Sale in the country.*

10. Where a property was set up for sale by an auctioneer in the country, first in lots, then part of it in batches of some lots together, then the whole together, the auctioneer having stated that he would receive biddings and that the Master would declare the purchaser, a person who was the highest bidder for a batch of some lots, and afterwards for the whole, was held to his bidding for the lots, though he was misled by the mode of

- selling, and intended to bid for the whole. C. *O'Grady v. Brady* 400
11. Where a sale is had in the country under the 139th Order, the bidders are not entitled to have notice of the confirmation of it by the Master. *Ibid*
 12. Observations on the impropriety of puffing advertisements published by the auctioneer, in a sale under the 139th Order, by BRADY, L. C. *Ibid* 403, 404

V. *Allocation of Rents after Sale.*

See RECEIVER, IV.

SALVAGE.

1. The consor of a judgment being seised in *quasi* fee became, by a deed prior to 1840, tenant for life of the lands, and created charges on them. The judgment creditor subsequently advanced sums to save the lands from eviction, and filed a bill for a sale during the consor's life. The rent being again in arrear, he made further advances to pay it under an order in this cause. *Held* (MOORE, J., *dissentiente*), that as a salvagor he was entitled to a sale of the *quasi* fee, though he could not have a sale as judgment creditor against the remainderman or creditors prior to 1840. C. *Fetherstone v. Mitchell* 35
2. "This (*Hill v. Browne*), then, is a distinct authority, that even where the estate is in strict settlement, the creditor negligent and the tenant for life grossly in default, a *bona fide* advance by the former to save the lease shall entitle him to priority and to payment by means of a sale." *Per* BROOKE, L. Com. *Ibid* 43
3. The nature of the rights of a salvage creditor, and how far they exceed or are merely accessorial to the right which entitles him to make the advance discussed, by Lds. Coms. C. *Ibid* 40 *et seq.*
4. A sub-tenant having redeemed his landlord's interest by advances for

head rent, filed a bill for the sale of that interest, and subsequently made further advances for the same purpose. *Held*, that these several advances were the first charge on the mesne landlord's interest in priority to incumbrances prior in date, and that the salvager was entitled to a sale for payment. Eq. Ex. *Locke v. Evans* 52

5. Meaning of salvage costs, and the rule respecting them discussed. C. *Fisher v. King* 460

And see *O'Dowda v. O'Dowda* C. 464

SCIRE FACIAS.

In proceeding on a *scire facias* on a recognizance, costs cannot be given against the Crown. C. *Queen v. Hobart* 397

As to the revival of judgments; See JUDGMENT, II; LIMITATIONS, STATUTE OF, V, VI.

SECURITY FOR COSTS.

Security for costs refused after the time for answering had expired. R. *Freel v. Trant* 278

Security for costs pending appeal; See APPEAL.

SEPARATE ESTATE.

See HUSBAND AND WIFE.
POWER, II.

SEQUESTRATION.

1. Against benefices; See GLEBE.
2. Sequestration may be awarded against the separate estate of a married woman for costs given against her. R. *Keogh v. Cathcart* 280
3. And is the proper remedy in proceeding against a married woman in equity; why. *Ibid* 285-6
4. It was argued on the authority of several English cases that a sequestration cannot issue without an attachment. That is not the rule of this Court.

Where a sequestration may issue without an attachment. By SMITH, M. R. *Ibid* 286

SERVICE OF SUBPENA.

See APPEARANCE.

JURISDICTION, II (Parties out of).

SETTING ASIDE PROCEEDINGS.

See DECREE, 3.

SOLICITOR, &c., 1.

SETTING ASIDE SECURITIES.

See FRAUD AND SURPRISE.

SETTING DOWN CAUSE.

Where the parties before decree entered into a consent to take accounts, which was made a rule of Court, and a Master's report obtained on it, upon which the cause was set down; *Held*, the cause could not be heard. C. *Hodnett v. Going* 421

SETTLEMENT.

See DEED.

PENALTY.

POWER.

TRUST AND TRUSTEES.

SOLICITOR, SOLICITOR AND CLIENT.

1. The Court will not, on the application of the client, set aside an order made on a consent signed by his solicitor, on the allegation that he acted without authority, there being no case of fraud or misrepresentation. R. *Connatty v. O'Reilly* 333
2. In cases of fraud or misrepresentation the Court might possibly relieve on motion. By SMITH, M. R. *Ibid* 335
3. "If the lady never authorised the petition to be presented in her name, the proper course is for her to make an application that the solicitor who used her name without her authority should pay the costs." *Per* SMITH, M. R. *Keogh v. Cathcart* 283

SOLICITOR, &c.

4. This Court has not jurisdiction to order the personal representatives of a deceased solicitor to deliver up title deeds on which they claim a lien. *R. Allen v. Jervoise* 583
5. Form of inquiry in an incumbrancer's suit where the deeds are in possession of a solicitor who claims a lien for costs which is disputed. *C. Walcott v. Graves* 396

STATUTES.

Whether retrospective or not; construction of the 87th section of the Bankrupt Act. *C. Clements v. Eccles* 229, 241

For cases on particular statutes; *See* the head required.

STAYING PROCEEDINGS.

See APPEAL, 1.

STOCK.

See BONUS.

SUBPCENA.

See APPEARANCE.

JURISDICTION, II (Parties out of).

SUBSTITUTION.

See WILL, III.

SUBSTITUTION OF SERVICE.

See JURISDICTION, II (Parties out of).

SUBSEQUENT INCUMBRANCES.

See CREDITOR'S SUIT, 8, 9, and references *sub tit.* INCUMBRANCES.

SUPPLEMENT AND REVIVOR.

Quere, whether the 102nd General Order applies to supplemental suits? *C. Bradley v. Davis* 134

As to supplemental bills; *See* BILL, II.

As to revivor; *See* ABATEMENT.

TRUST, &c.

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SURETY.

See JUDGMENT, VI (Joint judgment).

PENALTY.

RECEIVER, 5.

SURPRISE.

See FRAUD AND SURPRISE.
DECREE, 3.

SURVIVORSHIP.

See JOINT TENANTS.

JUDGMENT, VI (Joint judgment).

TENANT FOR LIFE.

See BONUS.

INFANT, 1, 2.

LIMITATIONS, STATUTE OF, 9.

RECEIVER, 4, 12.

TENANT IN TAIL.

See DEED, 5, 7.

TERM.

Sale of leasehold; *See* SALE UNDER THE COURT, 1.

Trust term; *See* DEED, 1.

TITLE.

See SALE UNDER THE COURT, I.

TITLE DEEDS.

See SOLICITOR AND CLIENT, 4, 5.

TOLERATION.

The introduction and extension of toleration laws, and their effect on the doctrine of civil death, considered by SMITH, M. R. *Evans v. Cassidy* 250, &c.

TRUST—TRUSTEE.

General Orders under Trustees' Relief Act, p. i.

1. A testator named A a trustee of part of her personal estate, and appointed him, her son and X's husband, her executors. The son and X's husband alone proved the will, but A did not disclaim. The son and X took life

interests in the trust fund, to a part of which the plaintiff became, by X's appointment, entitled. A had been the testator's agent, and acted in the management of the assets under powers of attorney from the executors who proved, and X, and after the son's death from the surviving executor and X, which authorised him to receive the assets for the uses and purposes of the will. On A's death the defendant, his son and executor, acted under a similar power, and continued to do so after the death of X's husband. X and her husband got possession of the entire assets. *Held*, that A and the defendant were responsible as trustees, and could not protect themselves as being agents only. C. *Montgomery v. Johnson* 476

2. A husband covenanted to insure his life for £1200, and assign the policy to trustees, and confessed a judgment to them for that amount, to be called in if the policy was not so assigned and kept up. Another sum of £800 vested in them by the same settlement on similar trusts was lent by the trustees to the husband on the security of the assignment of a policy of insurance for £800 on his life. No other policy was assigned to them, and no steps were ever taken to enforce the judgment or covenant. In a suit against the trustees after the husband's death, *Held*—first, that the proceeds of the policy were not necessarily to be considered as obtained in pursuance of the husband's obligation, but that the trustees might apply them for the purpose for which the policy was really assigned; and secondly, that their liability for default in not compelling the husband to insure depended on his ability. C. *Ball v. Ball* 370

3. The similarity of charges of a particular sum and of debts and legacies generally, and the sense in which the latter are termed trusts or enforced in equity, commented on, and trusts and

charges distinguished, by BRADY, L. C. *Dundas v. Blake* 138, 154-7

4. Cases in which a trustee is considered unfit to act, though there has been no abuse of the trust, enumerated, by BRADY, L. C. *Commissioners of Charitable Donations v. Archbold* 195

See also CHARITABLE TRUST.

EQUITABLE PROTECTION.

INTERPLEADER.

LIMITATIONS, STATUTE OF, I.

TRUST TERM.

See DEED, I (Construction).

VALUATION—VALUE.

The Poor-law valuation is, as a public document, evidence of the value of the lands comprised in it. C. *Wel-land v. Middleton* 603

S. P. *Swift v. M'Tiernan*. C. 602

VENDORS AND PURCHASERS.

Purchaser of a leasehold with a clause of forfeiture, which was broken and waived, and how affected with notice. C. *Spunner v. Walsh* 597

As to questions of title arising in judicial sales and practice therein; See SALE UNDER THE COURT.

And See CONDITIONAL SALE.

VESTING.

See WILL, II.

VOLUNTARY.

Voluntary compromise; See PENALTY.

Voluntary deeds; See DEEDS, II; JUDGMENT, 17 (Receiver).

Appointments to volunteers; See POWER, I.

VOWS.

See PROFESSION.

WAIVER.

By delay in suit; See LACHES.

Of irregularity; See APPEARANCE.

By landlord, not curing objection to leasehold title; *See SALE UNDER THE COURT, I.*

WARRANT OF ATTORNEY.

See AGENT.

INSOLVENT, 1.

WILL.

I. *Estates tail—Implication.*

1. A devise of lands in trust for A, a reputed son, for life, and after his decease for and to the first and every other son of A successively in tail male, and in default of such issue, to the daughter or daughters of A to hold to them, if more than one, and their heirs as tenants in common; and in default of issue of the said A, to and for testator's heirs. *Held*, that A took only an estate for life, and that no remainder in tail to him could be implied after the limitation to the daughters. C. *Tucker v. Baker* 104
2. The doctrine and cases respecting the construction of such devises, reviewed. *Ibid* 104
3. When, after the devise to the first taker, either generally or expressly for life, particular limitations are introduced in favour of his issue, followed by a limitation on failure of issue of the same person, if these particular limitations exhaust the entire line of issue in whose favour they are designed, without calling in aid any implication of a more general character to be deduced from the language of the limitation over, that limitation is to be considered as implying nothing more than has been expressed by the particular limitations which precede it; because the intention which it indicates has been already expressly and fully carried out. By BRADY, L. C. *Ibid* 120
4. In both classes of cases the intention is deduced, not from the words of the limitation over, but from those of the prior limitations. *Ibid* 121

5. The doctrine of general and particular intent explained, by BRADY, L. C. 119, 121

II. *Vesting—Intestacy.*

6. Devise of houses to executors in trust to receive the rents for the support, clothing, maintenance and education of the testator's children until they should respectively attain the ages of twenty-one years or marriage, and from and after that, to A, B and C, or such of them as shall be then living. *Held*, that the devise to A, B and C did not take effect in possession until after all the children attained twenty-one or marriage. R. *Farran v. Smith; In re Sherrys* 254
7. *Quære*, whether there was an intestacy as to the surplus rents beyond what was necessary for the maintenance and education of the children during their minorities? *Ibid*

III. *Substitution.*

8. By his will testator gave £2000 to his natural daughter for her separate use, the interest to be expended in her education. By a codicil he gave her £3000 in addition to the £2000. By a subsequent codicil, stating that he had not time to alter his will, to guard against risk, he charged all his property with £20,000 for his daughter (calling her by his own name) subject to the limitations and restrictions mentioned in his will. *Held*, that the £20,000 was in substitution of the gifts in the will and first codicil. C. *Russell v. Dixon* 418

IV. *Charges—Trusts.*

9. A testator devised to his wife his lands; by a separate clause he gave her certain chattels and then added; "fourthly, I order my wife to pay the following legacies," which he enumerated. He made her and another executors. *Held*, the legacies were charged on the lands, and the wife took the fee. C. *Johnson v. Brady* 386

10. Neither the word "thereout" or "paying" is required to make the payment of a legacy a condition so as to give the devisee the fee in lands charged with it. *C. Johnson v. Brady* 386
11. A devise of lands to A for life, subject to all the testator's just debts, legacies and funeral expenses, with a bequest of his personal property to A, the better to enable her to pay his debts, &c., does not prevent a judgment debt of the testator from being barred, or create a trust for the creditor. *C. Dundas v. Blake* 138
12. If any trust was created by the will, the devise in that respect was limited to the life estate of the legatee, being the better to enable her to pay the debts; *semble. Ibid* 159
- And See further, LIMITATIONS, STATUTE OF, I.
13. A testator devised to his sons to be disposed of as after mentioned all his estate in W., and to the survivor, &c., of his sons, and all his estate in P., subject to his proportion of the headrent, and also subject to and in trust to pay out of the rents thereof an annuity to his daughter, and the remainder of the rents until she should be paid a sum of £500. Then followed a bequest of an annuity of £40 charged on parts of W., and there was a residuary devise to the three sons. *Held*, that the bequests to his daughter were charged only on P. and not on any of W. *C. Borough v. Williamson* 18
- V. *Construction of particular words.*
14. "Words which are properly referrible to future acts may be so construed as to include past acts, as laid down in relation to the words *procreatis* and *procreandis*; but the clear intention of the instrument there required this forced construction to be put upon the language." By *BRA- DY, L. C. Dillon v. Dillon* 427
15. A bequest to the representatives of the late mercantile house of A and K, or to such person or persons as

should be entitled at testator's decease to their personal property, in satisfaction of a debt due by the testator's father; *Held*, claimable by the legal representative of the surviving partner, as representing the firm of A. and K., and not by the persons beneficially entitled to the properties of A. and K. *C. Kerrison v. Redington* 451

See also POWER, II (Jointuring).

VI. Other matters.

16. As to the disposal of the testator's property; See ASSETS.
17. The costs of a suit in the nature of an ejectment bill to recover devised property on a certain construction of a will, though doubtful, are not within the rule in administration suits, that they come out of the estate. *C. Johnson v. Brady* 386

WITNESS.

1. A defendant whose interest in the suit is so coincident with that of the plaintiff, that he might have been made a co-plaintiff, is nevertheless, under the 6 & 7 Vic. c. 85, a competent witness for the plaintiff. *C. Kelly v. Bennison* 605
2. The rule that a witness who had been examined in chief cannot be examined in aid without the leave of the Court applies only to an examination by the same party. Therefore where a witness who had been examined in chief by the plaintiff, and not cross-examined, was examined in aid by the defendant without an order, the Court refused to suppress the depositions. *R. Bannatyne v. Bannatyne* 359
3. A party examining on personal interrogatories in the office, may read a part without making the rest evidence. *C. Brabazon v. Teynham* 475
4. After replication filed in a suit to perpetuate testimony, it is not necessary to obtain an order to examine witnesses. *R. Allen v. Hacket* 355

A. R. J. D. L



